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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether *Miss. Code Ann.* § 11-3-23 (Supp. 1982), under which a mandatory penalty of fifteen percent of any money judgment is automatically imposed on an unsuccessful defendant-appellant, irrespective of the meritoriousness of the appeal, but which imposes no corresponding burden on the appeal of an unsuccessful plaintiff-appellant, whether frivolous or not, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the $1,600,000 punitive damage award against appellant on an insurance claim of $20,000 violates the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, and is otherwise invalid under the Contract Clause and the Due Process Clause of the Fourteenth Amendment, because it is grossly disproportionate to actual damages and vastly greater than any penalties prescribed by the Mississippi legislature for similar or analogous improper business activities, and because it was imposed under a standard of conduct newly formulated by the court below in this case and applied retrospectively to conduct that occurred almost seven years before that standard of conduct was announced.*

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* All parties to this case are named in the caption. Pursuant to Rule 28.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of appellant: Bankers Life and Casualty Company

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
A. Facts Relevant to the Constitutional Questions Presented	5
B. The Federal Questions Were Properly Presented	8
1. Presentation of the Federal Constitutional Challenge to *Miss. Code Ann.* § 11-3-23 (Supp. 1982)	9
2. Presentation of the Federal Constitutional Challenge to the Excessiveness of the Punitive Damage Award	10
C. The Federal Questions Presented Are Substantial	12
1. The Unconstitutionality of Miss. Code Ann. § 11-3-23 (Supp. 1982)	12
2. The Excessive Fines and Due Process Clause Questions	15
CONCLUSION	21

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is the wholly owned subsidiary of I.C.H. Corporation; Bankers Life and Casualty Company has controlling interest in, but does not wholly own, the Western Life Assurance Company.

TABLE OF AUTHORITIES

CASES — Page

Aetna Life Ins. Co. v. *Lavoie*, ___U.S. ___, No. 84-1601 (Apr. 22, 1986) ..... *passim*

Affholder, Inc. v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) 10, 13, 14

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 19

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1929) 9

Burlington Northern R. Co. v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986) ..... *passim*

Central of Georgia Ry. Co. v. *Steed*, 287 Ala. 64, 248 So. 2d 110 (1971) 10

Central Union Tel. Co. v. *Edwardsville*, 269 U.S. 190 (1925) 12

Chambers v. *Mississippi*, 410 U.S. 284 (1973) 10-11

Chicago, Burlington & Quincy R.R. Co. v. *Chicago*, 166 U.S. 226 (1896) 12

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 3

Dewey v. *Des Moines*, 173 U.S. 193 (1899) 12

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 14

Henry v. *Collins*, 380 U.S. 356 (1965) 22

Hughes v. *Hughes*, 441 U.S. 901 (1979) 22

Illinois v. *Gates*, 462 U.S. 213 (1983) 8, 10

Le Gras v. *Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934) 17

Life and Casualty Insurance Company of Tennessee v. *Bristow*, No. 18,556 (Cir. Ct. Lee Cty., Miss. Feb. 6, 1986) 19-20

Table of Authorities Continued

	Page
Lindsey v. *Normet*, 405 U.S. 56 (1972)	14, 15
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	22
Orr v. *Orr*, 440 U.S. 268 (1979)	22
Robinson v. *California*, 370 U.S. 660 (1962)	12
Solem v. *Helm*, 463 U.S. 277 (1983)	16, 17
Tigner v. *McGehee*, 60 Miss. 242 (1882)	9
Wallace v. *Jones*, 360 So. 2d 932 (Miss. 1978)	9
Walters v. *Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984)	10, 14
Walters v. *Inexco Oil Co.*, 440 So.2d 268 (Miss. 1983)	13
CONSTITUTIONAL PROVISIONS:	
U.S. Const. Art. I, § 10, cl. 1 (Contract Clause)	19
U.S. Const. Amend. VIII (Excessive Fines Clause)	*passim*
U.S. Const. Amend. XIV (Due Process Clause)	*passim*
U.S. Const. Amend. XIV (Equal Protection Clause)	*passim*
FEDERAL STATUTE AND RULE:	
28 U.S.C. § 1257(2)	3
Fed. R. Civ. P. 38	14
STATE STATUTES AND RULES:	
§ 12-22-72, *Code of Alabama* (1975)	9, 10, 13
Miss. Code Ann. § 11-3-23 (Supp. 1982)	*passim*
Miss. Code Ann. § 75-17-7 (Supp. 1982)	13
Miss. Code Ann. § 83-17-1 (1972)	16
Mississippi Supreme Court Rule 14	3
Mississippi Supreme Court Rule 19	3

Table of Authorities Continued

Page

MISCELLANEOUS:

Magna Carta (Excessive Amencements Clause) 17

English Bill of Rights of 1689, *1 Wm. & Mary. Sess. 2*, Ch. 2 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal From The Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

Bankers Life and Casualty Company, the appellant, appeals from the final decision and order of the Supreme Court of Mississippi dated September 11, 1985, affirming a judgment of the Circuit Court of Jackson County awarding appellee the sum of $20,000 actual damages and $1,600,000 punitive damages for breach of an insurance contract, plus interest and costs, and imposing a mandatory penalty of fifteen percent additional damages on appellant pursuant to *Miss. Code Ann.* § 11-3-23 (Supp. 1982); and the order of the Supreme Court of Mississippi dated February

26, 1986, denying appellant's Petition for Rehearing and Motion to Correct Judgment which sought reconsideration of that court's September 11, 1985 decision and order. The decision and orders of the Supreme Court of Mississippi have denied appellant protections guaranteed to it by the Excessive Fines Clause of the Eighth Amendment as made applicable to the States by the Due Process of the Fourteenth Amendment and by the Contract Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

OPINIONS BELOW

The opinions of the Supreme Court of Mississippi dated September 11, 1985, and opinions dissenting, are reproduced in App. A., *infra*, 1a-101a, and are reported at 483 So.2d 254 (Miss. 1985). That court's order of that same date affirming the trial court's judgment and assessing a fifteen percent penalty against appellant is reproduced in App. B, *infra*, 102a, and is unreported. The order of the Supreme Court of Mississippi dated February 26, 1986, denying appellant's Petition for Rehearing and overruling appellant's Motion to Correct Judgment, is reproduced in App. C, *infra*, 103a, and is unreported. The order and judgment of the Circuit Court of Jackson County, dated December 3, 1981, is reproduced in App. D, *infra*, 104a-105a, and is unreported; the Circuit Court issued no opinion.

JURISDICTION

The September 11, 1985 decision and the September 11, 1985 and February 26, 1986 orders of the Supreme Court of Mississippi necessarily upheld, *sub*

silentio, *Miss. Code Ann.* § 11-3-23 (Supp. 1982), against appellant's claim under the Equal Protection Clause of the Fourteenth Amendment that § 11-3-23 is unconstitutional. The September 11, 1985 order assessing a fifteen percent penalty against appellant issued automatically as a consequence of the September 11, 1985 decision of the Supreme Court of Mississippi affirming the judgment of the trial court. The penalty was not part of any appealable judgment until that time. Thus, consistent with over a century of accepted Mississippi practice, appellant's federal constitutional challenge to this statute, Question 1 presented to this Court, was properly presented in appellant's Motion to Correct Judgment and Brief in Support of Motion to Correct Judgment, dated October 11, 1985, App. E, *infra*, 106a-120a.[1]

A notice of appeal of this case to this Court was timely served and received by the court below on April 9, 1986, App. F, *infra*, 121a-122a. This Court has jurisdiction of this case under 28 U.S.C. § 1257(2). Question 2 was duly presented to the Supreme Court of Mississippi as discussed *infra* and may be decided with this appeal. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

This appeal is being docketed in this Court within 90 days from the February 26, 1986 order of the Supreme Court of Mississippi denying appellant's

[1] Appellant filed a Petition for Rehearing, pursuant to Mississippi Supreme Court Rule 14, in which it sought rehearing of the affirmance of the trial court's judgment, and a Motion to Correct Judgment, pursuant to Mississippi Supreme Court Rule 19, in which it presented for the second time its federal constitutional challenge to § 11-3-23.

Petition for Rehearing and overruling appellant's Motion to Correct Judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed . . . ."

2. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

3. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

4. The Contract Clause, Art. I, § 10, cl. 1 of the Constitution, provides, in pertinent part, that:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

5. Section 11-3-23 of the Mississippi Code Annotated (Supp. 1982) provides, in pertinent part, that:

> "In case the judgment or decree of the court below be affirmed, or the appellant fails to

prosecute his appeal to effect, the Supreme Court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment be for a sum of money, the damages shall be upon such sum . . . ."

STATEMENT OF THE CASE

Appellant seeks plenary consideration of its contentions that a judgment imposing $1,600,000 in punitive damages for failure to pay a $20,000 insurance claim, and the imposition on appellant of a mandatory fifteen percent penalty ($243,000) under *Miss. Code Ann.* § 11-3-23 (Supp. 1982), for its failure to prevail on appeal, have deprived appellant of substantial rights guaranteed by the Contract Clause and the Eighth and Fourteenth Amendments to the Constitution of the United States. The constitutional issues presented are substantial, and are intimately related to similar questions briefed and argued to, but not decided by, this Court in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (April 22, 1986), and pending before this Court in *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986). These issues, as the following discussion demonstrates, were properly presented to the courts of Mississippi.

A. Facts Relevant to the Constitutional Questions Presented

In January of 1979, appellee, Lloyd Crenshaw, was employed at the White Stores in Pascagoula, Mississippi. City Products Corporation, the parent corporation of White Stores, had in effect a group accident insurance policy with appellant. App. A, *infra*, 1a,

483 So.2d, at 256. The policy provided scheduled amounts for accidental loss of limb (among other disabilities). Appellee was covered by this policy.

Testimony at trial indicated that on January 6, 1979, appellee was repairing an automobile alternator in his home garage when part of the alternator fell and struck the top of his right foot. On January 8, appellee went to the Emergency Room at the Keesler Air Force Base due to swelling in his right foot. Appellee was treated by Air Force physicians and released that same day.

Several other visits to that hospital ensued. On January 13, appellee's foot swelled again and turned dark. Appellee returned to the hospital on January 14, 1979. Appellee was admitted to the hospital, but his lower right leg progressively worsened despite treatment. On January 18, 1979 his lower right leg was amputated. The post-operative pathology report concluded: "RIGHT FOOT AND LOWER LEG: SEVERE ARTERIOSCLEROSIS OF THE ARTERIES. GANGRENOUS NECROSIS." App. A, *infra*, 8a, 483 So.2d, at 259.

In June of 1979, appellee filed a claim with appellant for the loss of his lower right leg. After study of all medical records submitted by appellee, appellant's medical director, a specialist in general and vascular surgery, advised appellant's claims department that the limb loss was due to severe arteriosclerosis and was therefore not an "accidental" loss covered by the policy. Accordingly, on June 11, 1979, appellant denied the claim.

After further communications from appellee failed to change appellant's view of the cause of the limb

loss, appellee initiated suit seeking payment of his $20,000 insurance claim and punitive damages for the tort of bad faith refusal to pay that claim. The case was tried before a jury in the Circuit Court of Jackson County, Mississippi commencing on December 1, 1981. On December 3, 1981, the jury returned a verdict in favor of appellee in the sum of $20,000 actual damages and $1,600,000 in punitive damages on the bad faith claim.

On appeal, five Justices of the court below joined an opinion by Justice Hawkins affirming the trial court's judgment of appellant's liability on the contract claim and the punitive damage award. Three Justices dissented on the issue of liability for punitive damages, taking the position that "it seems a bit farfetched that such an accident, ten days later, would necessitate amputation of the right leg six inches below the knee." App. A, *infra*, 61a, 483 So.2d, at 282.

With respect to the excessiveness of the punitive damage award, the court split five-to-four in affirming the $1,600,000 award. The majority, in an opinion by Justice Sullivan, stated its view that

> [w]hile no hard and fast rule may be laid down with regard to the maximum amount of punitive damages which may be awarded in a given case, it is difficult to imagine that . . . the judicial conscience could be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant.

App. A, *infra*, 52a, 483 So.2d, at 279. Those five Justices, calculating the award as being only .54421 percent of the net worth of appellant, concluded that

the award could not "be said to shock the judicial conscience." *Id.*

Justice Hawkins, who had authored the majority opinion as to appellant's liability for contract and punitive damages, dissented, referring to the $1,600,000 award as "grossly excessive," App. A, *infra*, 54a, 483 So.2d, at 279, and stating that he could not "agree with the concept the bigger they are the more we ought to zap them." App. A, *infra*, 56a, 483 So.2d, at 280. Justice Hawkins concluded that the punitive damage award should be reduced by more than fifty percent, to $750,000. App. A, *infra*, 60a, 483 So.2d, at 282.

Three Justices dissented as to the award of *any* punitive damages, taking the position that "the majority en route to affirmance has wholly departed from [the Supreme Court of Mississippi's] general substantive rules regarding the assessment of punitive damages." App. A, *infra*, 90a, 483 So.2d, at 296. They would, instead, have awarded $20,000 on the breach of contract claim, pre-judgment and post-judgment interest, and the appellee's reasonable and necessary attorneys' fees and legal expenses. App. A, *infra*, 94a, 483 So.2d, at 301.

B. The Federal Questions Were Properly Presented

Appellant recognizes that it bears the burden to persuade this Court of its jurisdiction over this appeal in the absence of any express reference in the opinion of the court below to the federal constitutional provisions relied upon by appellant in that court. *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983).

1. Presentation of the Federal Constitutional Challenge to Miss. Code Ann. § 11-3-23 (Supp. 1982)

Question 1, challenging the constitutionality of *Miss. Code Ann.* § 11-3-23 (Supp. 1982), was presented for the first time in appellant's Motion to Correct Judgment, as well as the brief filed in support of that pleading. App. E, *infra*, 106a-107a, 110a-119a. This was the appropriate and logical time for appellant to present its constitutional challenge to that statute because there was no issue concerning the statute, nor any judgment or appealable order reflecting the application of that statute to appellant, prior to the issuance by the Supreme Court of Mississippi of its September 11, 1985 decision and order. Appellant's challenge to § 11-3-23 was raised at the first opportunity after entry of the order affirming the judgment of the trial court. *See Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-78 (1929).

Since at least 1882, the Supreme Court of Mississippi has recognized that questions regarding the implementation of § 11-3-23 and its predecessor statutes are appropriately raised by way of a post-affirmance motion in that court. *Tigner* v. *McGehee*, 60 Miss. 242 (1882). The court below entertained and rejected in post-affirmance proceedings an identical federal constitutional challenge to § 11-3-23 in *Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978). No case in the court below suggests that this challenge to § 11-3-23 was not timely presented as a matter of state law. The same is true in every other court which has been called upon to apply § 11-3-23 or its Alabama counterpart, § 12-22-72, *Code of Alabama* (1975).[2] Thus, the failure

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[2] Although the question when a challenge to § 11-3-23 must

of the court below expressly to rule on this federal constitutional challenge to § 11-3-23 in denying the Motion to Correct Judgment in no way undermines this Court's appellate jurisdiction over this case. *See Illinois* v. *Gates*, 462 U.S., at 220 n.2.

2. Presentation of the Federal Constitutional Challenge to the Excessiveness of the Punitive Damage Award

Appellant first challenged the excessiveness of the punitive damage award in its post-trial motions urging remittitur and a new trial. Appellant could not have known that punitive damages, if awarded at all, would be excessive until after the jury's verdict was rendered. *See Chambers* v. *Mississippi*, 410 U.S. 284,

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be raised in order to be considered by the court below is technically an issue of Mississippi law, appellant's assertion that such a challenge should be raised by post-affirmance motion is not only not contradicted by any case in the court below but is also recognized as appropriate by the only other court which has been called upon to apply § 11-3-23. Thus, the Fifth Circuit has entertained and decided in post-affirmance proceedings various questions arising out of application of § 11-3-23 to diversity cases coming to it on appeal from the federal district court in Mississippi. *See, e.g., Affholder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) (on motion to assess damages for appeal; motion denied); *Walters* v. *Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) (post-affirmance motion in district court to assess penalty; motion granted).

The same understanding also governs with respect to challenges to Alabama's virtually identical appeal penalty statute, § 12-22-72, *Code of Alabama* (1975), in both the Alabama courts, *see, e.g., Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 248 So.2d 110 (1971) (federal constitutional challenge in post-affirmance proceedings to § 12-22-72 decided against the challenge), and in the Eleventh Circuit, *Burlington Northern R. Co.* v. *Woods* No. 85-1088 *(cert. granted*, March 24, 1986) (post-affirmance federal constitutional challenge denied *sub silentio*).

290-91 n.3 (1973) (federal claim timely presented because it could not have been raised and ruled upon prior to conclusion of trial). The trial court squarely held that it was without *power* to reduce *any* punitive damage award. App. A, *infra*, 51a-52a, 59a, 483 So.2d, at 278-79, 281. Appellant's challenge to the excessiveness of the punitive damage award was renewed on direct appeal to the Supreme Court of Mississippi; appellant expressly invoked the Due Process Clause of the Fourteenth Amendment in support of its challenge to the punitive damage award on direct appeal, App. G, *infra*, 124a-136a, and renewed its Due Process Clause challenge in its Petition for Rehearing and brief in support thereof, App. H, *infra*, 137a-152a.

A majority of the court below, without explicit reference to the fact that appellant's challenge to the excessiveness of the award was expressly grounded in the Due Process Clause of the Fourteenth Amendment, disapproved the trial court's decision regarding that court's *power* to reduce punitive damage awards as excessive, App. A, *infra*, 51a-52a, 483 So.2d, at 278-79, and then proceeded to reject appellant's argument that the award was excessive. Appellant's presentation of this federal question therefore complies with this Court's articulated standards respecting the proper presentation of federal questions to state courts even though the court below made no reference to the Due Process Clause in its opinion.

Appellant is unaware of any case in this Court holding that a federal question raised in this fashion and in these circumstances nevertheless fails of proper presentation because the highest state court fails, in ruling against a litigant, to cite to the federal con-

stitutional provision relied upon by that litigant. *See Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 231-32 (1896). By expressly holding that it was without authority to reduce the punitive damage award, the trial court deprived appellant of "a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by that court." *Central Union Telephone Co.* v. *Edwardsville*, 269 U.S. 190, 194-95 (1925). Appellant presented its federal constitutional challenge to the excessiveness of the punitive damage award to the Supreme Court of Mississippi, squarely relying on the Due Process Clause.[3] Appellant could have done no more.

C. The Federal Questions Presented Are Substantial

The general substance of these questions was briefed and argued to this Court in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986). Accordingly, because the Court is already quite familiar with the questions involved, appellant will only briefly set forth its arguments that the questions are substantial.

1. The Unconstitutionality of *Miss. Code Ann.* § 11-3-23 (Supp. 1982)

Under *Miss. Code Ann.* § 11-3-23 (Supp. 1982), litigants who unsuccessfully appeal from money judg-

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[3] Appellant also relies in this Court on the Excessive Fines Clause of the Eighth Amendment in arguing that the punitive damage award is unconstitutional. That Clause is made applicable to the States by the Due Process Clause of the Fourteenth Amendment and may therefore be invoked in this Court, *see Robinson* v. *California*, 370 U.S. 660 (1962); the Excessive Fines Clause argument is but an "enlargement" of the argument made to the court below and therefore that Clause may be invoked here. *See Dewey* v. *Des Moines*, 173 U.S. 193, 194-95 (1899).

ments are automatically penalized an additional fifteen percent of the original judgment. Although most States have in place, by statute or rule, mechanisms designed to deter frivolous appeals, Mississippi is apparently the only State, other than Alabama,[4] to impose a non-discretionary, mandatory penalty upon affirmance of a money judgment without regard to the novelty or complexity of the factual or legal issues presented in a particular appeal.

If § 11-3-23 is designed to prevent frivolous appeals, it is both indiscriminately overinclusive and unreasonably severe, because it punishes those who pursue non-frivolous appeals in an extravagant sum totally unrelated to the costs imposed by that appeal on the appellee. At the same time, it is irrationally underinclusive because a plaintiff who fails to recover a money judgment at trial may take an unsuccessful appeal on wholly frivolous grounds without the risk of any comparable penalty whatsoever.[5]

The fundamental irrationality in the operation of § 11-3-23 is made even more irrational by the decision of the Fifth Circuit in *Affholder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984). In *Walters* v. *Inexco Oil Co.*, 440 So.2d 268 (Miss. 1983), the

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[4] The Alabama automatic penalty statute, § 12-22-72, *Code of Alabama* (1975), at issue in *Burlington Northern* does not differ materially in its operation from § 11-3-23.

[5] The interests of a judgment creditor in Mississippi are protected by *Miss. Code Ann.* § 75-17-7 (Supp. 1982), which provides for post-judgment interest from the date of entry of the judgment until the judgment is paid. Mississippi has no statutes or rules under which a party taking a completely frivolous appeal is subjected to monetary sanctions based upon the frivolousness of its appeal.

Supreme Court of Mississippi, on certification from the Fifth Circuit, held that § 11-3-23 confers a substantive right on plaintiffs for purposes of application of the doctrine laid down in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Although the Fifth Circuit initially accepted that view of the Supreme Court of Mississippi, *see Walters* v. *Inexco Oil Co.* 725 F.2d 1014 (5th Cir. 1984), later that year the Fifth Circuit, all judges concurring, reversed itself and declared that § 11-3-23 would not be implemented by that court. *Affholder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984).

In *Affholder*, the Fifth Circuit pointed out that § 11-3-23, unlike Rule 38, Fed. R. App. P., "penalizes those [appeals] that are merely unsuccessful" and "acts as a deterrent to exercise of the right to appeal." 746 F.2d, at 309. Thus, the *Affholder* decision not only recognizes that § 11-3-23 imposes a deterrent on the right to appeal, but it creates yet another class of litigants in Mississippi which is not subjected to the arbitrary imposition of a large penalty for exercising, unsuccessfully, their right to appeal.

Appellant submits that § 11-3-23 is simply irreconcilable with, and must be struck down under, the reasoning of *Lindsey* v. *Normet*, 405 U.S. 56 (1972). In *Lindsey*, this Court invalidated an Oregon statute that required a particular class of losing defendants, tenants, to post a double bond in order to appeal from a judgment in favor of their landlord. The Court stated that a State may act "to discourage patently frivolous appeals . . . if [its] rules are reasonably tailored to achieve these ends and if they are uniformly

and nondiscriminatorily applied." *Id.*, at 78. Section 11-3-23 fails all these tests.

If, as the Aetna Life Insurance Company argued to this Court in No. 84-1601, and as the Burlington Northern Railroad Company argues in its petition for certiorari in No. 85-1088, Alabama's less severe (ten percent) appeal penalty functions to deny losing appellants an equal opportunity to pursue their right of statutory appeal within the Alabama courts and the right of appeal within the federal court system in diversity cases, then the need for this Court to address this question in this case is manifest.[6]

2. The Excessive Fines and Due Process Clause Questions

The question whether the Excessive Fines Clause applies to a punitive damage award that is grossly disproportionate to punishments imposed by the State of Alabama for similar conduct, and to the conceded actual harm, was briefed and argued in a similar case, *Aetna Life Insurance Co.* v. *Lavoie*, *supra*. The arguments advanced to the Court by the appellant in *Aetna* are fully relevant to this case because, as stated by the court below, the purpose of punitive damages in Mississippi is "to punish defendant and to provide a substantial deterrent to it and others similarly situated. . . ." App. A, *infra*, 50a, 483 So.2d, at 278. In Mississippi, "the amount of punitive damages is a

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[6] If this Court were to decide in *Burlington Northern* that § 12-22-72 is "procedural" for purposes of *Erie* and that therefore the penalty assessed under § 12-22-72 against Burlington Northern was wrongly assessed, this Court would presumably not reach Question 1 presented in Burlington Northern's petition for certiorari—whether § 12-22-72 is unconstitutional under the Fourteenth Amendment.

matter committed solely to the . . . discretion of the jury." App. A, *infra,* 51a, 483 So.2d, at 278.

The punitive damage award here, $1,600,000, is 80 times greater than the insurance claim. Furthermore, had appellant been charged under Mississippi criminal statutes governing fraud in the procurement of payment or obligation for payment of insurance premiums and found guilty thereunder, appellant would have been assessed a maximum fine of $500. *Miss. Code Ann.* § 83-17-1 (1972). Thus, the punitive damage award in this case is 3200 times the maximum punishment assessed by the legislature of Mississippi for business misconduct which has been adjudicated to be a crime.

A fine imposed by a jury subject to no standards in its imposition and which is 3200 times greater than the relevant statutory fine for the closest analog criminal offense is without doubt excessive under the Eighth Amendment as interpreted and applied in *Solem* v. *Helm*, 463 U.S. 277 (1983). The only offense of which appellant was found "guilty" below was the offense of refusing to pay an insurance claim based on the determination that the claim was not a valid one. For reasons known only to the jury, a confiscatory penalty was imposed on appellant after the appellee had been made whole in damages. This punishment bears no rational relationship to either the alleged harm inflicted on the appellee, *id.*, at 290-91, or to the punishment prescribed for analogous conduct made criminal by the Mississippi legislature, *id.*, at 293-95, 298-99.

As this Court's decision in *Solem* v. *Helm* also establishes, the historical roots of the Excessive Fines Clause and the "principle that a punishment should

be proportionate to the crime" may be traced back to Magna Carta's regulation of "excessive amercements." 463 U.S., at 284. Indeed, as the Court observed in *Solem*, the guarantees in Magna Carta against the imposition of excessive fines were not "hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." *Id.*, at 285. The case relied on by the Court to support this statement, *Le Gras* v. *Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934), illustrates the application of the excessive amercement principle of Magna Carta to a fine imposed in a civil proceeding. That principle, incorporated into the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, Ch. 2, and subsequently into the Virginia Declaration of Rights (1776), was then enshrined in the Eighth Amendment by its Framers. *Solem* v. *Helm*, 463 U.S., at 285 & n.10.

Appellant was not charged with violation of Mississippi's criminal laws; instead, appellant was sued for failure to perform an alleged $20,000 contractual obligation. For this omission, appellant has been punished in a manner 80 times more severe than the actual damage its conduct allegedly caused and 3200 times greater than if it had committed and had been convicted by a unanimous jury convinced beyond a reasonably doubt of insurance fraud. Whether the principle of proportionality passed down from Magna Carta requires the reduction of the fine imposed in this case is a substantial question warranting this Court's plenary consideration.

Whether addressed under the Excessive Fines Clause or directly under the Due Process Clause of

the Fourteenth Amendment, the gross disproportionality of the fine in this case, exacerbated by the magnifying effect of the additional fifteen percent penalty imposed by § 11-3-23, presents a substantial federal question. As a matter of common sense, such capricious penalties cannot and will not deter decision-making and conduct such as that at issue in this case; nor has the Mississippi legislature found that such penalties serve any purpose in Mississippi. No insurer in appellant's position can determine what conduct it must avoid in the course of performance of its contractual duties so as to avoid the imposition of severe and unpredictable fines. The decision of appellant to deny appellee's claim was made on the basis of multiple reviews of appellee's medical file by a physician with distinguished credentials as a general and vascular surgeon who concluded that, as indicated in the post-operative pathology report, the loss of the limb was the result of severe arteriosclerosis. The fact that the jury disagreed with that thoroughly considered opinion is insufficient to sustain the punitive damage award in this case.

Furthermore, as pointed out by the Justices of the court below who dissented with respect to the award of any punitive damages, this award could be upheld only by modification of the substantive rules previously laid down in several decisions of the court below and by establishment of a new substantive rule under which punitive damages are now assessable against an insurer under different and lesser standards than the standards applicable in other punitive damage cases. App. A, *infra*, 90a, 483 So.2d, at 296.[7] As this Court stated in *Aetna*, slip op., at 8,

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[7] In its Petition for Rehearing, App. H, *infra*, 137a, appellant

> We need not blind ourselves to the fact that the law in the area of bad faith refusal-to-pay claims ... [is] unsettled ..., as the court's close division in deciding this case indicates.

The decision below is neither an aberration nor necessarily the most shocking example of arbitrary, capricious and uncontrolled punitive damage awards in Mississippi. Another Mississippi jury recently awarded $6,000,000 in punitive damages in a case in which the plaintiff was compensated by a separate award of $50,000 for mental anguish after recovering nothing on his contract claim. That case is currently on appeal to the Supreme Court of Mississippi.[8] In the

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argued that the affirmance of the punitive damage award required the court below to overrule several of its prior decisions, resulting in a decision which "changes the law" in Mississippi in violation of the Fourteenth Amendment. Appellant could not, of course, have anticipated these changes in Mississippi law. Whether addressed under the Fourteenth Amendment or the Contract Clause, Art. I, § 10, cl. 1 of the Constitution (which appellant will also invoke in this Court), the application of new substantive rules of law to conduct occurring well before the announcement of such rules advances no significant state interest and is unconstitutional where, as here, it results in the imposition of a substantial burden on the underlying contract of insurance. If the existing judge-made tort rules governing the award of punitive damages in Mississippi had been deemed inadequate, as applied to insurance companies, by the legislature of Mississippi in 1985, it is clear that statutory modification to those rules by the Mississippi legislature would raise a substantial issue under the Contract Clause if the Mississippi legislature had attempted to impose new rules retrospectively on insurance contracts to the detriment of insurers. *Cf. Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978).

[8] *Life and Casualty Insurance Company of Tennessee* v. *Bris-*

absence of a decision by this Court holding that the Excessive Fines Clause controls the size of punitive damage awards, the court below will once again be free to defer to the jury's unbridled discretion. Indeed, as indicated *supra*, the Supreme Court of Mississippi did not even seriously review the "excessiveness" of this award, stating that "it is difficult to imagine that, consistent with the rules of law [under which it reviewed requests to reduce verdicts], the judicial conscience could be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant." App. A, *infra*, 52a, 483 So.2d, at 279.[9]

The apparent rule of law in Mississippi is that punitive damage awards may be imposed in large and wholly whimsical sums by juries until they are so large that they "shock the judicial conscience," a characteristic which becomes recognizable only when the award reaches one percent of the defendant's net worth. Thus, for business judgments made by the scores every business day, insurance companies operating in Mississippi subject themselves to the imposition of enormous punitive damage awards by juries which have been given *carte blanche* by the

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tow, No. 18,556 (Cir. Ct. Lee Cty., Miss. Feb. 6, 1986). *See* App. I, *infra*, 153a.

[9] The State of Mississippi's legitimate interest in regulating the conduct of appellant extends only to insurance written in Mississippi. Thus, the license granted by the decision below to Mississippi juries to fine an insurer at least one percent of the net worth of all of the insurer's assets—even though virtually all of those assets are located outside of Mississippi and bear no relationship to the level of the insurer's business activity in Mississippi—constitutes a separate violation of the Due Process Clause of the Fourteenth Amendment.

Mississippi courts to create and impose their own system of fines in each and every case that goes to a jury.

This Court has the power and responsibility under the Eighth and Fourteenth Amendments to place constitutional restraints on such arbitrary awards. The punitive damage award here is excessive both in kind, because it serves no valid state purpose, and in degree, because it is grossly disproportionate to the actual damages and to the level of punishment imposed by the Mississippi legislature for analogous conduct.

CONCLUSION

Appellant's federal constitutional claims are substantial. It has been fined in an amount vastly out of proportion to the actual damages it was found to have caused. Its punishment has been imposed without any of the limits or protections that it would have enjoyed in a criminal proceeding in which its penalty would have been 3200 times less. Its punishment has been imposed under new substantive rules of law formulated by the court below in this case, years after its conduct occurred. Moreover, that result has been exacerbated by the non-discretionary imposition on appellant of an additional fifteen percent penalty, further multiplying the injustice, merely for exercising its right, in a legally and factually complex case, to appeal the judgment of the trial court.

This Court had before it the substance of these issues in a similar context in *Aetna Life Insurance Co.* v. *Lavoie.* In its decision in *Aetna,* this Court stated in unmistakable words that "these arguments raise important issues which, in an appropriate setting, must be resolved . . . ." Slip op., at 14. This case

clearly presents an "appropriate setting" in which to resolve these important issues. Appellant has pressed its federal constitutional challenges to this punitive damage award and to § 11-3-23 at every appropriate stage in this litigation.[10] Probable jurisdiction should be noted and this case set for argument.

April 25, 1986 Respectfully submitted,

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[10] Appellant is clearly entitled to have applied to this case any ruling of this Court on Question 1 as presented in *Burlington Northern* or in any other case in which questions similar to those presented by appellant may be presented and decided. *See, e.g., Henry* v. *Collins*, 380 U.S. 356 (1965) (per curiam) (application of constitutional rule announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to libel judgment on certiorari to Supreme Court of Mississippi); *Hughes* v. *Hughes*, 441 U.S. 901 (1979) (application of decision in *Orr* v. *Orr*, 440 U.S. 268 (1979), to case on appeal from Supreme Court of Alabama notwithstanding that Alabama courts had held federal question not timely presented).

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APPENDIX

APPENDIX

TABLE OF CONTENTS

	Page
APPENDIX A	1a
APPENDIX B	102a
APPENDIX C	103a
APPENDIX D	104a
APPENDIX E	106a
APPENDIX F	121a
APPENDIX G	124a
APPENDIX H	137a
APPENDIX I	153a

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW
Decided September 11, 1985

EN BANC.

Bankers Life and Casualty Company (Bankers Life) is a health and accident insurance corporation with principal offices in Chicago, Illinois. Lloyd M. Crenshaw is a resident of Pascagoula. Bankers Life appeals from a jury verdict and judgment of the Jackson County Circuit Court in favor of Crenshaw of $20,000 actual and $1,600,000 punitive damages, arising our of a claim for accidental loss of a lower right leg, alleged to be covered under a Bankers Life group insurance policy Crenshaw had through his employer, White Stores in Pascagoula, a subsidiary of City Products Corporation.

The main issues of this appeal are whether the question of punitive damages should have been submitted to the jury, and the propriety of the amount awarded.

We find the issue of punitive damages was properly submitted to the jury. A majority of the Court is of the opinion that the judgment of the lower court should be affirmed in its entirety.

HAWKINS, JUSTICE, FOR THE COURT, PART I:

FACTS

On January 18, 1979, Crenshaw's right leg was amputated about six inches below the knee by surgeons at Keesler Air Force Base Hospital. At the time he was 61 years old. Previous to that date Crenshaw had injured his right foot; however, there is some discrepancy in the record as to the precise date of the injury and nature of the trauma. We will give both Crenshaw's version and the history set out in the medical records.

January 6, 1979, was a Saturday. That evening he was working on his car's alternator when part of it rolled off his work bench and struck the front part of his right foot, just below where his shoelaces would have been had he been wearing shoes. Instead, he only had on socks and house slippers. He replaced the alternator on the car.

When he removed his house slippers, his foot was red and bruised, but not swollen. The skin was not broken. That night he took some aspirin.

The next day, Sunday, January 7, Crenshaw noticed that his foot had swollen during the night. He hobbled around the house that day, soaked his foot in warm water, and rested on his couch.

On Monday afternoon, January 8, Steven Crenshaw, an adult son living with his parents, drove Crenshaw to the Keesler base hospital, where he was seen in the emergency room. He was given medications and told to stay off his foot as much as possible.

Crenshaw testified he returned to the hospital, but did not state whether it was the next day or two days following. On this trip he said his foot was x-rayed and he was given a blood test. A splint was put on his leg and he was given crutches. On this trip he was told to keep

his foot elevated. Crenshaw testified when he elevated his foot that this eased the pain.

He made another trip to the emergency room when he was again checked, and released home. He returned Friday, January 12, at which time the wrapping was removed and he was again sent home.

The following day Crenshaw's foot was swelled again and had turned dark. On Sunday, January 14, his wife drove him back to the hospital, at which time he was admitted. Different Air Force physicians examined Crenshaw on his previous trips to the hospital.

During the week he was at home following his second visit to the hospital, Crenshaw stayed in bed, and in the day was not in great pain. At night, however, the pain increased and he could not sleep. When he first elevated his foot it hurt worse, but the pain would eventually ease. He characterized the injury to his foot as a bruise, with the pain so great he could not walk on it. Medication helped to ease the pain.

Mrs. Crenshaw saw her husband's foot the night of his injury. She said it was red and bruised looking, but the skin was not broken. She testified that the next day it started swelling and getting bluish-red looking.

Steven Crenshaw said the night his father injured his foot there was swelling, but that a "little black bruise on top of his foot" did not show up until the next day.

HOSPITAL RECORDS

The first medical record of this injury is a January 9, 1979 (Tuesday), emergency room report. That report states:

> 61 year old white male complaining of pain in right foot. Patient was driving auto and hit pole with foot on brake yesterday. Unable to stand on foot. Patient soaked foot in hot water last nite.

> Chief complaint: tingling across dorsum (top) toes of right foot, acutely tender at great right toe.
>
> O: swollen, tender right midfoot, especially base right first metatarsal (great toe).[1]
>
> Dorsalis pedis palpable (an artery in the foot, a continuation of the anterior tibial).

This January 9 report shows the x-ray negative, and the urinalysis (for possibilty of gout) as normal.

Crenshaw was diagnosed as having a "ligamentous injury metatarsal right foot". There is also a notation that the examiner discussed the case with Dr. Morrow, an orthopedist, and after consultation, a splint was applied, and Crenshaw was given analgesics for pain. He was given crutches, told not to bear weight on his foot, and told to return in a week to see an orthopedist. The examining physician was Dr. Thomas E. Scott, a resident.

There is also a sheet headed "CLINICAL RECORD CONSULTATION SHEET", which apparently is a request for consultation with the orthopedist. It is dated January 9. Under the sub-heading "Reason for Request" is the following handwritten notation: "61 year old white male struck on ball right foot with rebounding clutch. x-rays no fractures or dislocation. Please follow up ligament injury mid-foot." The provisional diagnosis is: "ligament injury 1st metatarsal-tarsal joint." This sheet is also signed by Dr. Scott, and the requested orthopedist is Dr. Morrow.

He was next seen January 11, with this notation: "Patient returned out of pain meds, was given 30 percodans 9Jan79." Dr. Scott, the physician on January 11, was concerned that Crenshaw might be taking too much pain med-

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[1] For the convenience of the reader, we have at times, in parenthesis, explained medical terms. We have also written out abbreviations except when the abbreviations, as they appear in the medical records can be clearly understood by the non-medical reader.

ication. Dr. Scott told Crenshaw to return to the orthopedist as planned.

The records show Crenshaw was seen on January 12 by Dr. Henry J. O'Neal, an internal medicine intern. Crenshaw presented himself as being out of pain medication. He also complained that he was not obtaining relief from the medication. There were no diagnostic tests run on either the January 11th or 12th visits.

The records show Crenshaw returned on January 14th and was again seen by Dr. O'Neal. Noted were swelling and red streaks progressing up the lower extremity, the foot swollen, and toes blue. A blister was noted on the back of his foot. The pulses were not palpable. There was a decreased sensation to pinprick of his extermity. There was also a mild enlargement of lymph nodes in the groin. X-rays to determine gangrene showed no gas in the soft tissues of the affected extremity. The red blood cell count was normal. The white blood cells were elevated to 13,300, being above the upper limit normal of 10,000. Dr. O'Neal's impression was a superficial infection with swelling and decreased vascular flow.

Dr. O'Neal noted the need for a surgery consultation, and Crenshaw's condition was recognized as being serious enough for him to be admitted to the hospital.

Dr. Dan L. Locker, chief resident on vascular surgery, examined Crenshaw, and his report that day recites the following:

> Ext. (external) - RLE (right lower extremity) - pitting edema from knee distal
>
> Pop (popliteal) doppler - strong
>
> PT (posterier tibial) - present 2 cm above mallelous - weak monophasic
>
> DP (dorsalis pedis) - present 2 cm above ankle line -weak monophasic

Perineal - present - biphasic at ankle line

Foot is pale - white with mottling Vth toe purple - distal half

Sensation decreased distal to MT-P (metatarsal - phalingeal) line

A (diagnosis) - Cynasis 2^0 (secondary) to swelling over 12 hr. duration confine to distal extremity (beyond ankle line).

P (recommend)(1) Elevate
(2)Anticoagulate with Heparin

Pt Ed (Patient Education) Pt (patient) informed of options and hi prob (high probability) of loss of part of foot

Staff - Pt. presented to Dr. Fontenelle who examined patient and agrees with plans.

Dr. Torma also notified.

Crenshaw was seen by Dr. Christopher T. Westphal, an Air Force general surgeon on January 17, 1979, who performed a surgical amputation on the following day. He was assisted by Dr. Dale V. Hoekstra, a Board certified orthopedist.

Dr. Westphal's operation report, dated January 23, in pertinent part states the following:

PREOPERATIVE DIAGNOSIS

Vascular insult, right foot

* * * * *

OPERATIVE DIAGNOSES

Same

* * * * *

FINDINGS:

The patient was found to have an ischemic right foot with a necrosis of the distal aspect. This was amputated in the manner about to be described. [Emphasis added]

PROCEDURE:

The patient was administered epidural anethesia. His right lower extremity was prepped and draped in a sterile manner. A tourniquet was applied with 450 mm. of mercury with a total tourniquet time of 14 minutes. A fishmouth apex of the incision approximately 6– below the tibia plateau. The anterior and posterior vessels were identified and ligated. Similarly, the peroneal vessels were identified and ligated with 2-0 silk suture material. The greater and lesser saphenous veins were also identified and ligated. The remainder of hemostasis was assured with electrocautery. At the time of operation, the stump was noted to be extremely ischemic and the muscles somewhat dusky looking with a little free bleeding at the time of operation. The posterior tibial nerve was grasped, cut and allowed to retract. The periosteum of the tibia was incised and elevated. The tibia was divided with a saw. Similarly, the fibula was divided approximately 1– shorter than the tibia. . . A Penrose drain was inserted in the base of the wound with the ends of the drain coming out of the incision bilaterally.

S/DALE V. HOEKSTRA, MAJ, USAF MC

The January 22 pathology report of the stump, notes: "Vasculature is unremarkable. The skin is mottled up to 5 cm. above the digits." It concludes as follows:

(A) Right Foot And Lower Leg: Severe Arteriosclerosis Of The Arteries. Gangrenous Necrosis

Dr. James P. Durning, Resident in Surgery, prepared the Narrative Summary of Crenshaw's problems on February 2, also signed by Dr. Locker. The pertinent portions of this summary read as follows:

DATE:

14 January 79

HISTORY OF PRESENT ILLNESS:

Lloyd Crenshaw is a 61 year old white male who presented to the emergency room at Keesler Medical Center on *14 Jan 79* with a complaint of *pain* in his right foot. *The patient was one week status post injury to his right ankle in an auto accident.* The patient had been *previously seen in the emergency room and was told to remain off his leg and keep it elevated. The patient failed to do this at home, and came in complaining of right foot pain.* On presentation to the emergency room, the *foot* was noted to be painful, *bluish-white, cool to exam,* with *absent distal pulses.* The patient was admitted, placed on Heparin therapy, and the foot was elevated.

PAST HISTORY:

The review of systems was essetially unremarkable. The patient has no history of pulmonary, cardiac or bowel disease. His chief complaint was as noted above. *Past medical history was also unremarkable.* Past surgical history was remark-

able for an appendectomy in 1951 and lysis of adhesions in 1977. Family history was noncontributory. *The patient is a heavy tobacco user.* He uses occasional alcohol. *He was on no medications at the time of admission.*

CLINICAL FINDINGS ON ADMISSION:

Clinical findings on admission *indicated a well developed, well nourished white male.* HEENT were unremarkable. Pulmonary examination revealed good breath sounds bilaterally without any rales or rubs. *Cardiac exam was unremarkable. No murmurs were heard.* Abdominal exam was also within normal limits with a soft, nontender abdomen and a long midline surgical scar. *Examination of the extremities was remarkable for a blue and cold, paresthetic right foot. There were no auscultable pulses in the foot. Necrosis of the distal toes was also noted.*

* * * * *

X-RAY STUDIES:

Chest x-ray was unremarkable. X-ray of the right lower extremity did not reveal any gas indicative of gas gangrene.

PROGRESS IN HOSPITAL:

The patient was admitted and placed on strict bedrest with *elevation of the right leg.* He was also placed on *Heparin therapy* at the time with constant monitoring of PT and PTT. Despite adequate *heparinization, the foot failed to resolve. On 18 Jan 79, the patient was transferred to the Surgery A Service and underwent a right below the knee amputation.* Amputation was performed under the direction of *Dr. Locker* and *Dr. Hoekstra of the Orthopedic Department.* Postopera-

tively, the patient did well. The stump has been healing well.

* * * * *

FINAL DIAGNOSIS:

1. *Anterior compartment syndrome, right leg.*
2. *Isthemia of right leg.*

[Emphasis added]

On April 9, 1979, Crenshaw filled out a proof of claim on the Bankers Life form, with a medical authorization for the insurance company to obtain all medical information it needed from any physician or hospital. No physician's statement was executed on behalf of Crenshaw because of an Air Force regulation. Bankers Life was notified of this regulation, and also informed that the Air Force would reproduce photocopies of all medical records and send these. The narrative summary, Dr. Westphal's operation report, and the pathology report were sent to Bankers Life when Crenshaw made his claim.

Bankers Life employed Equifax, Inc., an investigating agency, to investigate the claim. The agency interviewed Steven Frye, manager of the local store and also one of Crenshaw's neighbors, but did not obtain any medical records. Its report dated April 24, 1979, concluded:

> SUMMARY/SUGGESTION: We do suggest that you allow us to diary this case for some six weeks and go back into the area to interview Mr. Crenshaw. He is at the hospital five days per week, comes home on week-ends, and will be there an additional 5-6 weeks.

Equifax was not requested to perform any further services for Bankers life following this report.

William J. Herzau was supervisor of the Special Risks Claim Unit of Bankers Life. In this department William

A. Blessing and Robert N. Krol reviewed Crenshaw's claim along with Herzau.

Dr. Nathaniel P. McParland[2] is a physician, specializing in general and vascular surgery, and also a salaried employee of Bankers Life as Medical Director. His responsibility was to make medical judgments on claims, a job which constituted one-fifth of his practice.

Donald Lemersal was one of seven full-time attorneys constituting the legal department.

These individuals participated in the decision making process of Crenshaw's claim.

On June 19, 1979, Herzau sent Dr. McParland a memo explaining the final diagnosis, Banker's Life position and requesting an evaluation.

Dr. McParland replied by memo to Herzau the same date.

TO: William Herzau

FROM: N. P. McParland, M.D.

* * * * *

> Mr. Crenshaw's records have been reviewed. Noted is the absence of the record of the original injury. However, Mr. Crenshaw's loss of limb was not because of an anterior compartment syndrome, but because of severe arteriosclerotic changes in his distal blood vessels and subsequent ischemia and necrosis. The operative report indicates the obstructing arteriosclerotic area most likely is in the femoro popliteal artery area

---

[2] The trial record spells the doctor's surname as "McParlin" while the Bankers Life records and briefs spell it "McParland". We will use the latter spelling.

> though no mention of the femoral or popliteal pulses is noted.
>
> Mr. Crenshaw will most likely require futher amputative surgery.[3]

On July 11, 1979, Herzau wrote Mrs. Marilyn Doyle, Administrator of Employee Benefits of City Products Corporation, Crenshaw's employer:

> We now have the facts needed to service your claim.
>
> The above captioned policy is an accident only policy defining injury as:
>
> > "Injury wherever used in this policy means bodily injury causing the loss while this policy is in force, directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person."
>
> According to the medical information we have, it appears that Mr. Crenshaw's limb loss was because of severe arteriosclerotic changes in his distal blood vessels and subsequent ischemia and

---

[3] In this initial correspondence there was an obvious breakdown of information and communication. The question and answer of paragraph 3 of Crenshaw's proof of claim states:

"3. Describe fully *how* and *where* the accident occurred. (Answer) Removed alternator from wife car, and carried it to work bench. Removed armature from housing and was checking brg. on armature when housing rolled off bench and hit right foot."

Furthermore, on both the operation report signed by Drs. Westphal and Dale V. Hoekstra, orthopedic surgeon, and the pathologist's report the pre and operative diagnosis was "vascular insult, right foot." These reports were examined by Dr. McParland. The medical term "insult" means trauma. We will return to this perplexing failure to make further inquiry.

> necrosis and not due to *an injury as defined above.* Therefore, we cannot identify that a covered loss has occurred under the terms and interpretations of the policy.
> [Emphasis added]
>
> So, we sincerely regret that no benefits are payable.
>
> If we have in any way misinterpreted the information furnished us, or if there is additional information we should have, please let me know.

On July 10, 1979, the case reserve was reduced from $20,000 to $3,000.

On September 25, 1979, Herzau's denial was communicated to Crenshaw in a letter from Leon Mueller of White Stores, a subsidiary of City Products Corporation.

Thereafter, Crenshaw obtained the following statement dated October 5, 1979, from the Air Force:

> 1. Mr. Lloyd Crenshaw was hospitalized in late January 1979 where he underwent a below-the-knee amputation of the right leg. From a thorough review of his records dating back to 1972, I am unable to find any evidence of symptomatic atherosclerotic disease in his right lower extremity prior to the injury which ultimately caused him to undergo a right below-the-knee amputation. When seen in the Emergency Room initially for this injury, a dorsalis pedis pulse was palpable and documentation of this is substantiated in the records. This documentation was noted on 9 Jan 1979. Following the initial injury he developed a gangrenous right foot. He was admitted and a trial of heparinization and elevation in order to save the lower extremity was undertaken. This was not successful and as a result a below-the-knee amputation was performed. The specimen

> was submitted to pathology for diagnosis. At that time it was apparent to the pathologist that he had severe atherosclerosis of the arteries of the lower extremity.
>
> 2. I would feel that the atherosclerosis is an underlying condition and not the immediate cause of the gangrenous necrosis. The precipating event must be considered to be the trauma which intially brought him to the Emergency Room on 9 January.

This statement is signed by Dr. Dale V. Hoekstra, the orthopedist attending the surgery; Dr. Robert L. Morrow, chairman of the Department of Orthopedic Surgery; and Dr. Thomas T. Coolidge, Director of Hospital Services.

In answer to a letter from Mrs. Doyle stating Crenshaw wished to appeal his claim, Herzau replied on December 4, 1979, repeating Bankers Life's position as previously set out, stating in pertinent part:

> In order to reconsider this claim, we would need additional medical information showing that Mr. Crenshaw's loss was due to an *accidental bodily injury directly and independently of all other causes.* [Emphasis added]

An interoffice memo from Blessing to McParland dated March 27, 1980, notes the receipt of the correspondence from the three doctors dated October 5, 1979, and attaches it to the memo:

> Mr. Crenshaw underwent a right below knee amputation on January 18, 1979 after reportedly sustaining an injury to the leg on January 6, 1979.
>
> This claim was previously denied on the basis that the amputation was caused by vascular conditions rather than an injury.

> Mr. Crenshaw has advised that he would like to appeal this decision. He has furnished us with the attached medical report from the Department of the Air Force.
>
> *I see nothing in the report which would change our decision on this case.* However, we would appreciate it if you would review the file once again paying particular attention to this new information. [Emphasis added]
>
> Do you still feel that Mr. Crenshaw's limb loss was due to his vascular problem rather than his January 6, 1979 injury? Also, do you feel there is any additional information which would be helpful in making a determination? If so, what?

Dr. McParland's memo to Blessing dated April 2, 1980, states:

> The records again have been reviewed. Again noted is the admitting examination of this heavy smoker with a cold, pale, paresthetic, right foot with absent distal pulses. An anterior compartment syndrome would affect only the anterior tibial artery and dorsal pedal pulse. The posterior tibial artery is the major artery to the foot and this too was occluded producing the physical findings and the resultant amputation of the lower extremity. This was confirmed in the pathology report and, therefore I feel no *further information* is necessary to sustain our previous diagnosis. [Emphasis added]
>
> If I can be of further help, please call.

On April 8, 1980, Herzau wrote Crenshaw, stating: Our medical director has once again reviewed your file.

This policy is an accident only policy defining injury as:

> "Injury wherever used in this policy means bodily injury causing the loss while this policy is in force, directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person."
>
> According to all the medical information we have, it appears your limb loss was due to severe arteriosclerotic changes in the distal blood vessels and subsequent ischemia and necrosis and not due to *any injury as defined above.* This opinion was confirmed in the pathology report. Therefore, we cannot identify that a covered loss has occurred under the terms and interpretations of the policy. [Emphasis added]

Crenshaw then employed an attorney, who wrote Herzau on May 15, 1980, demanding payment, and stating that Crenshaw's trauma was a precipitating event to his trouble, as revealed by the medical records.

Herzau wrote Lemersal a memo on May 16, 1980, asking him to review the file, stating Crenshaw's lawyer had furnished no new information, and only an "opinion" that Crenshaw's condition came within the terms of the policy.

Lemersal replied to Herzau by memo dated June 19, 1980:

> I do not feel there is a legal question presented here at this time. Until *we know more about the condition and how* (and whether) *the alleged accident contributed* to cause the loss we cannot very well apply the Mississippi law regarding proximate cause.
>
> If an injury caused the loss we should have some further substantiation of this. I suggest that in writing to Attorney Schroeder you explain in

> some detail what our file contains and point out to him that we must have some substantiation that an injury caused this loss *"directly and independently of all other causes."*
>
> If there is further substantiation that the loss is the result of the combination of disease and accident Mississippi law holds that where "injury aggravates, renders active, or set in motion a latent or dormant pre-existing physical condition or disease . . ." there may be recovery under this type policy. Peerless Insurance Company v. Myers, 192 S 21 437 (1966, Miss. Sup.Ct.). However, we do not know what effect the alleged injury had on this condition, or whether the arteriosclerotic changes were dormant. [Emphasis added]

On July 15 Crenshaw's attorney responded with a strong letter, again requesting payment, explaining the position of Crenshaw that the trauma contributed to the problem causing the amputation. He quoted from the three physicians letter of October 5, 1979:

> I would feel that the atherosclerosis is an underlying condition and not the immediate cause of the gangrenous necrosis. The precipitating event must be considered to be the trauma which initially brought him (Crenshaw) to the Emergency Room on 9 January.

This letter again stated if the company wished to dispose of this case without litigation, to please forward payment.

A memo from Blessing to Herzau on July 23 states:

> Dr. McParland feels this limb loss is due to preexisting vascular problem. However, it appears *there is some evidence his physical condition deteriorated rapidly after this event.* Per Don Lemersal, Mississippi law holds that where "injury

> aggravates, renders active, or set in motion a latent or dormant pre-existing physical condition or disease. . ." there may be recovery under this type policy. In view of attorney Schroeder's letter of 5-15-80, I suggest we consider the possibility of a compromise. [Emphasis added]

On June 27 Herzau wrote Crenshaw's attorney, again denying coverage on the ground that there was no evidence that Crenshaw's alleged "injury caused this loss 'directly and independently of all other causes.' " Herzau also explained that it was the view of Bankers Life's medical director that:

> The *operative report indicates the obstructing arteriosclerotic area most likely is in the femoro popliteal artery area although no mention of the femoral or popliteal pulses is noted.*
>
> [Emphasis added]

Blessing wrote a memo to Lemersal on July 28:

> This 63 year old auto parts manager is claiming limb loss due to a January 6, 1979 injury to his right foot. A car part fell on his foot reportedly resulting in a below knee amputatior on January 18, 1979.
>
> Dr. McParland has reviewed this file twice and feels that this limb loss is due to a pre-existing vascular condition. However, there is some evidence that his physical condition deteriorated after this trauma.
>
> You previously advised us that Mississippi Law holds that where "injury aggravates, renders active, or sets in motion a latent or dormant pre-existing physical condition or disease. . ." there may be recovery under this type policy.

> Please see Attorney Schroeder's letter of July 15, 1980. This letter contains no additional factual information regarding Mr. Crenshaw's medical problems. Rather, it contains Mr. Schroeder's interpretation of the previously submitted medical information. Since Mississippi is a penalty state, I request that you review this file and respond to Attorney Schroeder's letter.
>
> If you prefer, please advise what type of response we should give and I will write Attorney Schroeder.

Lemersal in turn contacted Dr. McParland, who wrote the following memo to Lemersal dated August 7:

> The records have been reviewed again. *Noted is the absence of an emergency room report* on the alleged injury which has been described on the discharge summary as a jarring injury to the right leg. On the narrative summary the patient gave a history of injury to his right ankle in an auto accident for which he was seen and advised in an emergency room. Mr. Crenshaw states he dropped an *armature onto* his right foot.
>
> His physical findings were that of complete arterial occlusion to foot and lower leg with necrosis of the distal tips of the toes.
>
> This severe occlusive arterial disease in this heavy smoker necessitated an amputation six inches below the knee, and the pathology report indicated severe arteriosclerosis indicative or relatively long standing disease.
>
> A diagnosis of anterior compartment syndrome and ischemia of the leg was the final diagnosis.
>
> If Mr. Crenshaw had an anterior compartment syndrome, which he did not, malpractice is in

evidence because the treatment is division of the fascia enclosing the musculature not leg amputation.[4]

If Mr. Crenshaw in reality did to his leg, foot or ankle depending upon which report is read, he either had no evidence of any injury, and therefore was sent home from the emergency room, or if there was injury again malpractice is in evidence because of lack of treatment in a severely diseased foot from atherosclerosis and the absence of any pulses. The treatment of choice being immediate hospitalization and heparin therapy.

Because of the absence of an emergency room report, I must conclude there was either no trauma or the trauma was insignificant.

Mr. Crenshaw suffered from severe occlusive arteriosclerosis of all arteries at least as high up as six inches below his knee, resulting in ischemia and gangreene [sic] of his foot.

* * * * *

In conclusion, Mr. Crenshaw has a very common disease for which various therapies are instituted in virtually every hospital in the country. No trauma is necessary to produce the end results suffered by Mr. Crenshaw *and from the reports presented,* I feel the alleged *trauma has not been documented,* and even if all three areas were traumatized at one time, there would be no cause and effect situation.

---

[4] Dr. McParland was correct in his conslusion that "anterior compartment syndrome" was not the correct diagnosis of Crenshaw's problem.

> So, we sincerely regret that the policy does not permit payment of benefits.

Crenshaw instituted suit November 10, 1980, for $20,000 actual damages and $400,000 punitive. The declaration was later amended to claim $1,635,000 in punitive damages.

At trial in December, 1981, three physicians testified: Dr. Perry J. Hockaday and Dr. Westphal, who testified for Crenshaw; and Dr. McParland, who testified for Bankers Life. Neither Dr. Hockaday nor Dr. McParland had treated or examined Crenshaw.

DR. HOCKADAY

Dr. Hockaday is a general surgeon who had been practicing 15 years in Pascagoula. Prior to this he was a surgeon in the Air Force. In answer to a hypothetical question, he testified that the amputation was a result of injury. The precipitating cause in his opinion was trauma, probably combined with arteriosclerosis of a severe nature. He testified that one of the common causes of people who have loss of limbs with arteriosclerosis was accidental trauma. The trauma did not have to be severe. He explained that the patient would have an inability to heal the wound by virtue of poor blood flow to the extremities. Further, a person with poor blood flow such as Crenshaw was more susceptible to severe complications from minor injuries because any swelling would result in a further decreased blood flow to an area already experiencing poor circulation.

In making a determination of whether there was an arterial occlusion independent of any trauma or whether trauma played some part in the problem, Dr. Hockaday testified the entire medical record needed to be examined, not just portions of it as seen by Dr. McParland. Of utmost importance to Dr. Hockaday was the emergency room report, which documented an injury of some type to Crenshaw, distinguishing him from someone who simply came in off the street with a need to have his leg amputated.

Dr. Hockaday testified (Record, P.670):

> We're dealing with swelling, and swelling is the culprit. We're talking about a long-standing disease that has evolved over 61 years and a gradual diminished flow. . . a flow that has not diminished to the point of creating a problem by itself solely, but with that little bit that tips it over—and that is the swelling of the foot and the shutdown of the circulation in the toes. . . And that's where usually gangrene of this nature starts, in the toes, rather than a diffuse problem.

He was of the opinion that the dark, dusky muscle and tissue observed by the pathologist could have been caused by the tourniquet used during surgery.

He stated that a person with arteriosclerosis who sustains an injury presents a very hard problem to the doctor, who hopes the patient will have enought circulation to heal the wound. Yet, there is no way to make the swelling go away, and it is a matter of waiting and hoping.

He stated that people who have amputations solely from vascular problems will usually have a history of leg pains, and severe pain in walking. Their troubles are progressive, not spontaneous.

DR. WESTPHAL

Dr. Westphal gave a deposition by video tape which was introduced at trial. He testified he first saw Crenshaw on January 17, the day before surgery. He reviewed the medical records, and in his opinion Crenshaw already had a decreased flow of blood because of arteriosclerosis, but that situation was compounded by trauma.

He testified that the swelling caused a further decrease in blood flow to the foot, that the blood flow would not take care of waste, and the injury would not heal. He

stated that the flow of blood may have caused a thrombosis, or clot to develop locally in the arteries at the very end of the foot, and that as a result of the low flow state, impoverished by swelling, that tissued died and gangrene developed.

Dr. Westphal acknowledged it was perfectly conceivable that Crenshaw could have presented himself in the emergency room one day with a cold foot and no pulses on basis of an obstruction either from an embolism, or the blood flow to the foot was so slow due to gradual blockage that the artery had clotted. He testified this was seen relatively frequently; in fact, in most cases this was how physicians saw people with peripheral artery disease. He also acknowledged this possibility in Crenshaw's case.

The distinction to Dr. Westphal in Crenshaw's case was that Crenshaw did have trauma to his right extremity, and he was of the opinion this aggravated a pre-existing condition which led to loss of the extremity.

He acknowledged one could say it was just a coincidence that he had trauma, and would have lost his extremity, anyway; however, he expressed his opinion as follows:

> I can simply state that having been there a few days down the line and having reviewed those records, I believe it was a situation where trauma came, compounding atherosclerosis, and led to loss of the foot.

He was of the opinion that most likely there would have been some previous symptoms, such as pain in walking, if atherosclerosis alone had caused the amputation.

Dr. Westphal also was of the opinion that while the documents seen by Dr. McParland would give a general idea as to what was wrong with the patient and what happened to him, they were not sufficiently accurate to make many judgments concerning the patient. The physician needed to go specifically to the entire medical re-

cord, not simply the summary. The pathology report was insufficient, in his opinion, and also inaccurate as to the location of the amputation. There was also a discrepancy in the pathologist's finding upon a visual inspection of the blood vessels as normal, while the microscopic diagnosis revealed severe atherosclerosis of arteries and gangrenous necrosis. Dr. Westphal apparently felt some clinical observation should have supported the microscopic diagnosis.

Significant to Dr. Westphal was a review of Crenshaw's hospital records since 1972 which disclosed no evidence of symptomatic atherosclerotic disease prior to 1979. This would have indicated a definite predisposing cause to eventual amputation. It was not uncommon for a patient with hardening of the arteries to develop symptoms on exercise, and as the disease progressed, less exercise would cause pain. Also, he would have pain just from the disease if an artery were blocked. Crenshaw was a fairly active man, employed full time, with hobbies such as golfing, fishing, and outdoor recreation.

Dr. Westphal explained that thrombosis was a blood clot. In an embolism a piece of tissue has broken off, floated downstream and blocked a vessel. This would give a patient ischemia. A thrombosis meant the blood flow to the vessel had slowed sufficiently that it clotted, and the clot acted as an obstruction rather than a piece of tissue broken off.

He stated an actual clot could begin at any point, and that physicians are concerned with propagation of the clot, whereby blood adjacent to the clot also clots and extends, making a long line of clot.

Dr. Westphal noted Dr. Locker's examination and initial Doppler evaluation on January 14 showed pulse at the popliteal level was very strong. He was of the opinion there was no femoral artery occlusion or popliteal artery occlusion when Dr. Locker examined Crenshaw on January

14. He also observed that Dr. Locker noted farther downstream the pulses were considerably weaker.

Dr. Westphal stated there were four symptoms of vascular insufficiency and occlusion of vessels: pain; paralyzed muscles; parathesia (tingling); pallor paleness to extremity.

He was of the opinion that on January 9 Crenshaw exhibited none of these symptoms. Yet on January 11 he was complaining of pain, and as time went on he developed parathesia. On the 14th his toes were blue, and upon being admitted to the hospital he evidenced parathesia, a paleness, pallor and a decrease in the pulses, as well as some degree of decreased muscle function.

Upon being asked why the arteries in both sides of his leg would be involved when there was an injury to his foot, Dr. Westphal replied this was the key to the whole situation, and why in his opinion Crenshaw lost his leg.

First, Crenshaw had a pre-existing atherosclerosis causing some decrease to the blood flow in his lower extremity. Then, he had an accident in which his foot was injured. Swelling developed which caused a further decrease in blood flow, and the whole foot swelled. All three arteries were affected. This swelling caused a decrease in blood flow locally to the foot. The blood flow could not take care of the waste product, and the injury could not heal. It might even have caused a thrombosis, or a clot to develop locally in those arteries at their very ends, and thus as a result of the low flow state and swelling, tissue died, and he developed gangrene. This led to amputation. (R.715)

He said it was very hard to tell how long direct trauma will take to give trouble. In a healthy individual it would take a complete blockage, by having a portion of the artery ripped away. In such a case a patient could develop problems immediately. In a low blood flow situation, however, it could take a while for a clot to develop and the patient have symptoms. The situation was variable.

DR. McPARLAND

Dr. McParland was the medical expert offered by Banker's Life. He testified his first opinion was given following examination of the pathology report, surgeon's report and some—but not all —of the medical reports. He did not have the benefit of any emergency room report or the admitting examinations on January 14, 1979.

Based on the surgeon's report of no blood supply distally to six inches below the knee, no evidence of trauma or injury to any part of the leg or foot, and the pathology report that Crenshaw had arteriosclerosis obliterans (hardening of arteries, narrowing and occlusion of the arterial bore), accelerated by his smoking two packs of cigarettes a day, Dr. McParland was of the opinion this disease alone caused the amputation.

As to trauma playing any part, he testified that the "blood stopped below the knee, according to the surgeon's report," and the trauma was to the foot. Therefore, according to Dr. McParland, any claim that an injury to the foot caused blood stoppage up below the knee was similar "to dropping a tree in a dry river bed and saying that two miles up the stream there's no water because it's the tree's fault."

He explained how the femoral artery in the groin and thigh becomes the popliteal artery, which in turn divides into three parts just below the knee: the peroneal, the posterior tibial and the anterior tibial, which extend and branch off into other arteries in the foot. The major trouble in arterial disease was where the arteries divided at the adductor magnus tendon and took a sharp turn.

An artery is very tough, he explained, like a garden hose, and that if the posterior tibial artery was damaged the anterior tibial artery took over.

He claimed the original records he examined showed no evidence of trauma: no redness, nc bruising, no bleeding,

as well as no swelling. The only diagnosis made initially by the treating physician was strain of the fourth metarsal ligament, which to Dr. McParland was insignificant.

Dr. McParland testified a review of Crenshaw's history, including that before the accident, confirmed his original opinion that the disease alone caused Crenshaw's problem and trauma had nothing to do with it.

An October 18, 1975, emergency room report showing a visit from Crenshaw to the hospital indicated pain in left calf with the cause undetermined. Further, Crenshaw had been hospitalized in 1978 for an abdominal obstruction, at which time an arterial pulse taken in his left leg showed only one-half normal, and there was no palpable pulse in the posterior tibial artery in his left leg.

Dr. McParland was of the opinion that if Crenshaw had been properly diagnosed orginally on January 9, 1979, with proper treatment the leg might have been saved, or at least amputation of only part of the foot would have been required.

Of main significance to Dr. McParland was the fact the surgeon's report indicated no bleeding when the tourniquet was removed. He said the tourniquet was only on for 13 minutes. In practice, after surgery the tourniquet is removed and the surgeon looks for bleeding blood vessels, and they must be sewed shut to avoid massive hemorrhaging. They are not tied off with a catgut. He said the flow was like a garden hose, and the report should indicate the "pulsatile blood flow" from the different arteries. The main reason for noting blood flow was so the next surgeon would know the exact condition of the blood vessel. It must be noted that Dr. McParland has never used tourniquets in his surgery practice.

In this particular case, according to the report of Dr. Westphal (as explained by Dr. McParland), Dr. Westphal took the tourniquet off and his search revealed no bleeders,

and he reported no, or virtually no, bleeding, which meant Crenshaw's vascular blood supply stopped above there. Crenshaw's popliteal artery was not pulsating, and therefore not bleeding.

Dr. McParland testified Crenshaw was seen by at least ten doctors and not one of them reported any evidence of injury such as a bruise, broken skin, scratch or redness. Dr. McParland testified that his diagnosis was supported by the fact that physicians using the Doppler ultrasound technique could only find one artery with measurable blood flow.

He testified the physicians determined where to amputate from the Doppler ultrasound showing that except for the peroneal artery there were only monophasic sounds.

On cross-examination Dr. McParland testified that a person with a severe case of arteriosclerosis affecting his lower extremities who dropped something on his foot was in no greater danger of developing problems from such injury than a healthy individual. This diseased condition made no difference.

He also testified a patient could cause an occluded artery by crossing his legs. Then he testified he did not believe a swelling of the foot would contribute to an occlusion. Rather, it was his view the occlusion in the upper part of the leg caused the edema.

Dr. McParland was of the opinion Crenshaw suffered no traumatic injury to his arteries. While acknowledging that trauma could cause a problem, he was of the opinion trauma played no part in Crenshaw's problem:

> Because if he had significant trauma to occlude the artery or to rupture or to lacerate it, then it would be one cause. But without any damage, with no evidence whatsoever of trauma—no redness, no swelling, no bruising, no discoloration, no fractured veins—a progressive disease going

> up his leg, I don't see . . . I couldn't correlate trauma to the foot with no blood supply below the knee. [R.985]

He reached the conclusion there was no swelling, bruising or redness because none of the reports mentioned it.

He was of the opinion Crenshaw's occlusion occurred in the popliteal artery, somewhere above where it divided into three arteries.

LAW

Was there a jury issue on punitive damages?

There are two significant cases which serve as guidelines on this question.

In *Standard Life Insurance Co. of Indiana v. Veal,* 354 So.2d 239 (Miss. 1978), involving the wrongful refusal by an insurance carrier to pay a claim due under a credit life insurance policy, we repeated familiar criteria justifying award of punitive damages.[5]

Punitive damages are in addition to actual damages, and are in the nature of punishment for the wrongdoing of the defendant, and to set an example so as to deter others from similar behavior. *Snowden v. Osborne, 269 So. 2d 858 (Miss. 1972), and cases cited.*

The basis in awarding such damages is to reward a plaintiff for public service in bringing the wrongdoer to account. Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So.2d 226 (1962), and cases cited.

Punitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong. *Seals v. St. Regis Paper Co.,* 236 So.2d 388 (Miss. 1970).

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[5] The holdings in this case were reiterated in the recent case of *Reserve Life Insurance Co. v. McGee,* 444 So.2d 803 (Miss. 1983)

In *Veal* we then stated.

> This case demonstrates the necessity of awarding punitive damages when an insurance company refuses to pay a legitimate claim, and bases its refusal to honor the claim on a reason clearly contrary to the express provisions of its own policy. If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely. We are of the opinion the refusal to pay the legitimate claim in this case was an intentional wrong and constituted an independent tort as comtemplated in *Progressive Casualty Insurance Co. v. Keys, supra.*
>
> Of course, if an insurance company had a legitimate reason or an arguable reason for failing to pay a claim, punitive damages will not lie, but in this case the defendant had no reason to contest the claim filed with it. We therefore hold that punitive damages were allowable.

354 So.2d at 248.

Richards v. Allstate Co., 693 F.2d 502 (5th Cir. 1982), involved a policy exclusion which this Court in *Lowery v. State Farm Mutual Automobile Insurance Co.*, 285 So.2d 767 (Miss. 1973), had previously held violated public policy and was unenforceable. In spite of our decision in *Lowery*, Allstate Insurance Company kept the exclusion in its standard policies sold in Mississippi. Allstate did, however,

inform its executive personnel to honor claims which would otherwise, under the exclusion, be denied. The lower echelon personnel (apparently not getting the message) denied the claim, based upon the exclusion. The Court of Appeals held retention of the invalid exclusion, failure to provide adequate procedures to prevent erroneous denials on this claim, plus denial of plaintiff's claim justified submitting the issue of punitive damages to the jury under Mississippi Supreme Court decisions.

In *Reserve Life Insurance Co. v. Magee,* 444 So.2d 803 (Miss. 1983), and the recent case of *Blue Cross & Blue Shield of Mississippi, Inc. v. Campbell,* No. 54,744 (on petition for rehearing decided April 10, 1985, and not yet reported), we held that the trial judge should first determine from all the facts of the case whether the issue of punitive damages should be submitted to the jury. In *Blue Cross* we stated, ". . . it is the function and responsibility of the trial court to determine whether the insurance carrier had a reasonably arguable basis, either in fact or in law, to deny the claim." We also stated in *Blue Cross* that any plaintiff asking for punitive damages had a heavy burden.

Did Bankers Life breach the contract in such a way as to amount to an intentional wrong, or in doing so was it so grossly negligent that the breach constituted an independent tort? *D.L. Fair Lumber Co. v. Weem,* 196 Miss. 201, 16 So.2d 770 (1944).

Was there an "intentional and unreasonable refusal" to pay a legitimate claim? Was there a *legitimate or an arguable reason* for failing to pay Crenshaw's claim? *Standard Life Insurance Co. v. Veal,* supra. Or, was there a "reasonably arguable basis, either in fact or in law, to deny the claim"? *Blue Cross,* supra.

These criteria in turn require an evaluation of the conduct of Bankers Life in handling this claim, as well as the

reason it gave for denying the claim prior to actual trial, and the reason given during the trial.

PRE-TRIAL

Bankers Life's handling of this claim prior to trial is a striking example of how an insurance claim should not be handled.

Crenshaw submitted his claim under the policy. The attending physician's form could not be filled in and completed by his attending physicians because of Air Force regulations. He did, however, sign authorization for Bankers Life to examine every medical record in existence pertaining to himself, and to interview any treating physician.

Bankers Life's own investigative procedures set forth what should have been done in such a case. *Indeed,* the special claim inquiry form transmitted to Equifax Service requests quite specific information:

> Investigation is not confined to points checked below. Cover fully, but in addition, use good judgment in following all leads.
>
> * * * * *
>
> Interview attending physician PERSONALLY and:
>
> Use confirmation of interview, Form 1425.
>
> Obtain photocopy of his records (if not available, explain).
>
> Emphasize following point(s) when personally interviewing physician:
>
> Question thoroughly regarding policy provisions checked above.
>
> Past health history . . .

Determine if injury is sole cause, independent of all other causes.

Exact cite of amputation [this handwritten in]

Obtain hospital record.

Photocopy entire record.

Exclude: nurses notes-temp charts.

EKG reports.

Signed statement on confirmation of interview.

Signed medical authorizations.

Description of circumstances surrounding accident.

Description of injuries.

Name and address of doctors and hospitals where confined.

The company did *none* of this. Only minimal information was procured from Equifax Service, following which no further information was requested by Bankers Life. There was no interview of Crenshaw, no interview of any of his doctors, and no request for medical records. Instead, relying on the three medical entries Crenshaw sent with his claim, his claim was denied. There is no dispute that these medical documents did not tell the complete story of Crenshaw's problems. It is also clear to this Court that what Crenshaw did send was sufficient to either justify payment of his claim, or at least require Bankers Life to make a full and thorough investigation, interview Crenshaw and his family, look at all of his medical records, and interview his doctors *before his claim was denied.*

Instead Bankers Life denied his claim, and gave as a reason therefor an exclusion under the policy which its

executive personnel knew was invalid under Mississippi law.

In *Peerless Insurance Co. v. Myers,* 192 So.2d 437 (Miss. 1966), a case actually read and cited by counsel for Bankers Life in his memo, we stated, P. 439:

> In cases involving insurance policies which allow recovery for "loss resulting directly and independently of all other causes from accidental bodily injury," recovery may be had where the accidental injury aggravates, renders active, or sets in motion a latent or dormant pre-existing physical condition or disease, which in turn contributes to the disability or death for which recovery is sought, and where the accidental injury is a proximate cause of the resulting loss. [Citations omitted]

This well-established principle has been restated by this court and reaffirmed in the cases of *Zurich Insurance Co. v. Ruscoe,* 203 So.2d 305 (Miss. 1967); *Lincoln American Insurance Co. v. Ruscoe,* 210 So.2d 769 (Miss. 1960).

In its group insurance policy covering Crenshaw, Bankers Life had the following provision:

> Injury wherever used in this policy means bodily injury causing the loss while this policy is in force, directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person.

Despite the consistent holdings of this court that such a policy provision would not have prevented Crenshaw from recovery had the trauma to his foot played any part in the loss of his limb, Bankers Life at all times prior to trial denied coverage for this reason appears in all correspondence to Crenshaw or his representatives, and after suit was filed in the answer to the interrogatories.

In our cases we have spoken of "bad faith". This exclusion was particularly deceptive in this case. Common sense tells us there are many accidents which in and of themselves might cause no particular problems, but coupled with the physical condition of the victim can cause serious injury or disease. How many Bankers Life insured have there been who sustained some minor injury, and because of some underlying physical condition suffered serious problems, yet who accepted at face value the clear language of the policy? It would not be at all beyond the bound of reason for such injured insured to have read the initial rejection, examined his policy, and concluded that he was not covered. Such insured in all likelihood would not have known about our court decisions. Bankers Life, on the other hand, did know about them.

Bankers Life played the odds in this case and lost.

This case is really worse than *Allstate.* In *Allstate* the company personnel at least were notified not to deny coverage under an invalid policy exclusion. In this case Bankers Life took the consistent and deliberate choice to deny coverage for an invalid reason.

In their dealing with Crenshaw, Bankers Life personnel knew they were under a duty not to give an invalid reason for denying his claim. This duty was violated.

The Fifth Circuit Court of Appeals in two cases has interpreted our holding in *Veal* to mean that if the carrier offers no justifiable reason or arguable basis under Mississippi law for denying a valid claim, the issue of punitive damages must be submitted to the jury. *Black v. Fidelity & Guaranty Ins. Underwriters,* 582 F.2d 984, 990-991 (5th Cir. 1978); *Vogel v. American Warranty Home Services Corp.,* 695 F.2d 877 (5th Cir. 1983).

We think this is a sound interpretation of *Veal.* Surely, if a justifiable reason or an arguable basis for denying a claim exists, the insurance company is under a duty to

assert it; however, without that foundation the requisite intent or gross negligence necessary for the recovery of punitive damages may reasonably be inferred.

The reason given by Bankers Life for denying this claim up until actual trial was that Crenshaw had not shown that the amputation resulted from an injury "directly and independently of all other causes", and effected "solely through an accidental injury." Such a claim constitutes no arguable defense under the Mississippi law. Bankers Life subjected itself to punitive damages by consistently asserting this reason for denying Crenshaw's claim.

FAILURE OF DUTY

Aside from what Bankers Life consistently wrote Crenshaw and his representatives for a period of approximately two years, however, is the manifestly strange conduct of the executive personnel of Bankers Life, including its legal and medical departments.

Dr. McParland noted the absence of an emergency room report in all of his written memos, yet Bankers Life made no attempt to get a copy. The failure of Bankers Life to follow its own investigative procedures is blatant. By reviewing the complete medical records and interviewing the attending physicians and Crenshaw, Bankers Life could have answered any of the questions Dr. McParland raised prior to and at trial.

House counsel for Bankers Life testified he deemed the refusal to be purely a medical reason, not "legal". This is specious. He knew that reputable doctors were of the opinion that trauma did play a part in the eventual amputation, he was certainly aware of our decision in *Peerless*, and he should have known of authority from several jurisdictions would have affirmed an award to Crenshaw under the policy. See: *U.S. Casualty Co. v. Thrush*, 21 Ohio App. 129, Ohio L.Abs 714, 152 N.E. 796 (1926) (stubbed toe coupled with arteriosclerosis: amputation); *Fi-*

delity Reserve Ins. Co. v. English, 282 S.W.2d; 951 (Ark. 1956) (roofing tack foot wound coupled with arteriosclerosis: amputation); *Bumpus v. Eastern Greyhound Bus Corp.,* 291 N.Y. Supp.2d 540 (1968) (irritation of wet feet plus arteriosclerosis: amputation), in which appellate courts in three jurisdictions faced with similar questions affirmed awards of trial courts. Also, see Couch on Insurance, 2d ed., Vol. 10, § 41:86, P.146.

The executive personnel of Bankers Life, a nationwide health and accident insurance company which has been in business a number of years, unquestionably knew their duty under the law to properly investigate any claim. Proper investigation in this case meant the obtaining of all available medical information relevant to Crenshaw's claim. See generally authorities cited in Couch on Insurance 2d ed., Vol. 15A § 58.10, p. 277.

This was not a claim by a third party under a liability insurance policy, but a claim from a customer policy-holder of many years. Crenshaw was entitled to an honest, not disingenuous response to his claim.

With these basic premises in insurance law, the following questions are pertinent:

1. **Why was Dr. McParland never asked to make his determination based on the applicable legal standards?**

This record shows Dr. McParland never knew prior to trial what the legal criterion was in order for the claim to be due under the policy.

Dr. McParland should have been told: "Doctor, if trauma had anything to do with the loss of Crenshaw's leg, even though disease may have played a major part, under Mississippi law this is an accidental loss under the policy. Also, Doctor, we are under a duty to obtain all relevant medical information in order for you to make a determination based on all the facts. Therefore, do not make any medical eval-

uation until you are satisfied as a physician that you have all the information required to render a valid medical opinion."

Had Dr. McParland been told Bankers Life's responsibility under the law, it is inconceivable he would not have required the company to interview Crenshaw and his family and ascertain precisely how the accident occurred, what discoloration and swelling followed and where the pain was felt. Acting reasonably, Dr. McParland would have examined all medical records available to ferret out the relevant information. He noted discrepancies in the medical records furnished him, and an error as to the final diagnosis, which indicated a need to examine all records. Furthermore, his memos mentioned the missing Emergency Room report, this showing that he had some questions about the history of the accident. After examining all of the records, any further information needed was readily available by interviewing the attending physicians.

Furthermore, even without knowledge of the applicable *legal* standard, Dr. McParland should have recognized that under any standard of prudent medical practice it is foolhardy to attempt to make a diagnosis on incomplete medical records. Dr. McParland's in-house memos clearly indicate that he knew review of Crenshaw's emergency room record was essential to a trustworthy diagnosis; however, he never required Bankers Life to obtain a copy of it before rendering his opinion. The inter-office memos indicate the executive personnel engaged in a distinct, yet subtle nudging of McParland in the direction of an opinion favorable to it. They "used" their doctor and he quite willingly accommodated them in the affair. Dr. McParland ignored the gaps in information needed in order to make an accurate evaluation, picked the facts favorable to Bankers Life, and gave a medical opinion.[6]

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[6] Dr. McParland was quick to assert that at least ten doctors had seen Crenshaw, and none of them noted any trauma to his foot. Al-

2. Why wasn't Crenshaw told the reason Bankers Life was denying the claim?

As we have noted Bankers Life was under a duty to investigate Crenshaw's claim, and if the company's doctor was of the opinion trauma had nothing to do with amputation, to tell this to Crenshaw.

Bankers Life did neither. Its personnel did not make a proper investigation, and on incomplete information told Crenshaw his claim was denied. The reason they gave was not what their doctor had said, namely: trauma had nothing to do with the limb loss. Instead, they told Crenshaw he had to demonstrate that the accident, solely and independently of all other causes, caused the limb loss, a manifest impossibility in his case. Then, they told him if *he* had any further information to submit it, assuming no responsibility of checking the facts further themselves.

This conduct evidences a lack of confidence in their own doctor's opinion. For, not until trial began did Bankers Life ever attempt to claim that the actual reason for denying coverage was that the accident had nothing to do with the amputation.

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though this assertion is not supported by the record, the Court also notes that not one of these attending physicians reached the diagnosis Dr. McParland asserted. In fact, it is clear from the medical records and Dr. Westphal's testimony that Crenshaw's physicians were confronted with an injury to a foot that rapidly deteriorated up the leg, resulting in amputation. There is nothing in the medical records or Dr. Westphal's testimony to indicate that any of them considered the original problem to be an occlusion beginning around the knee.

These physicians were "on the scene," they examined Crenshaw, and Dr. McParland did not. Instead of interviewing these attending physicians, Bankers Life and Dr. McParland were content to deny the claim upon incomplete facts. In other words, they quit when they were ahead.

TRIAL DEFENSE

Was Bankers Life entitled to rely on Dr. McParland's opinion?

Bankers Life argues that Dr. McParland was a qualified and reputable doctor. Why should punitive damages be assessed when he testified disease alone caused the limb loss? Since there was a jury question on whether the accident had any causal relation to the amputation, based upon Dr. McParland's testimony, how can punitive damages be assessed?

This ignores the conduct of Bankers Life prior to trial and the reason it gave Crenshaw and his attorney for denying the claim. Lemersal, the house counsel, even advised Herzau to inform Crenshaw's lawyer Bankers Life must have proof that an injury caused the loss "directly and independently of all other causes."[7]

Crenshaw could argue with some cogency Bankers Life should have been estopped to assert this variant defense for the first time at trial.

Furthermore, the issue is not the defense which Bankers Life at trial finally settled upon to defend the suit, but the reason it gave Crenshaw for denying the claim. See: *Aetna Life & Casualty Co., Inc. v. Lavoies*, (Ala. 1985).

Moreover, it is not simply whether a jury question on liability is presented that is determinative, but whether Bankers Life knew the facts it asserted to make the jury issue were valid. Dr. McParland was not an independent physician in this case, but an employee and agent of Bankers Life. What he knew, or should have known, was imputed to Bankers Life.

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[7] Lemersal defended himself by testifying this was the policy language. When reminded this was contrary to Mississippi law, Lemersal replied Mississippi law had little, if any, bearing on whether the claim was "payable or deniable." (R.612)

An insurance company faced with two separate and distinct medical theories, each of which is supported by reputable physicians, and one of which would exclude liability, probably should not have punitive damages assessed if it asserted in court the theory favorable to its position. This would be true even though a jury rejected the company's position in the trial on actual damages.

It was not disinterested witnesses' particular version of the facts, or one medical theory arrived at by independent evaluation, which Bankers Life chose to rely on in this case. Instead, it was an opinion of its own employee on incomplete facts.

This leaves us with the inquiry as to whether Dr. McParland was a witness or an advocate in his medical opinion. The jury was entitled to examine the bona fides of Dr. McParland's testimony, just as they were entitled to scrutinize the other manifestly strange behavior of Bankers Life we have set out.

In any field of human endeavor judgments based on incomplete information are perilous. It is clear from this record that Dr. McParland both before and during trial freely expressed his opinion when he either did not have all the facts, or having them before him, chose to ignore those facts which either should or conceivably could have altered his opinion.

Three reasons were stressed by Dr. McParland for his assertion trauma had nothing to do with Crenshaw's limb loss bear scrutiny.

1. **No Sign of Trauma. Dr. McParland said the medical records showed no sign of redness, swelling, bruising, or breaking of skin. He said of the "ten" doctors who saw Crenshaw from his initial trip to the emergency room through his hospitalization, none noted any trauma. "He did not even break a vein, much less damage an artery."**

While the medical records vary on the initial accident causing the foot injury, Crenshaw informed Bankers Life from his first claim thenceforward that the cause of his foot injury was dropping a part of an automobile alternator on his foot. Bankers Life never challenged the accuracy of Crenshaw's version of the initial injury.

That dropping a metal object on an unprotected foot would not cause some swelling and some bruising of that extremity defies common experience. Dr. McParland was never instructed to, and never bothered to obtain a history from Crenshaw or his family, or to discuss the clinical observation of Crenshaw's foot with the emergency room doctors. He never considered the possibility that even if there had been no notation of swelling it might have resulted from a failure to record, rather than the fact that there was no swelling or bruising.

Yet, even the medical records dispute Dr. McParland.

When Crenshaw was seen by the resident, Dr. Scott, on January 9, 1979, he noted a "swollen, tender right midfoot."

On January 14 Drs. O'Neal and Locker noted swelling from the foot upward.

2. **A severely arteriosclerotic patient who suffers minor trauma to his foot is in no more danger of serious complications than a perfectly normal person.**

This particular view, of course, is totally at odds with the medical opinions expresses by both Drs. Hockaday and

Westphal. It is also inconsistent with Dr. McParland's own assertion on the witness stand that an occlusion can occur from as simple an act as crossing your legs.

Dr. McParland gave no medical authority for this conclusion, and some rather basic medical authorities state otherwise. *Textbook of Medicine,* by Cecil, Vol. I (16th ed. 1982), Chapter 36.1 "Peripheral Vascular Disease Due to Organic Arterial Obstruction," p. 318, states:

> Patients should protect limbs from cold or *trauma;* careful attention to keep the skin scrupulously clean, dry and soft is important. Even minor infection such as the dermatophytoses may produce problems. Toe nail trimming should be done regularly and with care.

See, also: Harrison's *Principles of Internal Medicine* (9th ed.), Chapter 253, "Vascular Diseases of the Extremities"; Robbins and Cotran, *Pathologic Basis of Disease* (2nd ed.), pp. 608-613. Indeed, in the August, 1979, issue of *The Journal of Trauma,* there is an article entitled, "Complete Disruption of Axillary Artery Caused by Severe Atherosclerosis and *Trivial Nonpenetrating Trauma.*'[Emphasis added]

Atherosclerosis by its very nature is a narrowing and hardening of blood vessel walls, as well as gradual clogging of the blood stream with fatty deposits. A view that a patient with a severe case of atherosclerosis is no more likely to have severe complications from minor trauma and swelling than a perfectly normal person defies common sense.[8]

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[8] Dr. McParland illustrated his medical opinion mentioning a log in a stream. Simple physics and hydraulics (if not the most rudimentary observation) also instruct us that, given the same pressure, a tube with its inner lining encrusted and with trash in it is more likely to stop up than it would if clear and clean.

3. The occlusion was above the knee.

According to Dr. McParland, even giving Crenshaw the benefit of the doubt that problems could have been caused by his injury, the occlusion which stopped the blood flow was not in the foot, but in the popliteal artery before it branched off into the anterior and posterior and the peroneal arteries, the three main arteries supplying the lower leg and foot. Dr. McParland's opinion was the occlusion was in the popliteal artery or higher in the femoral artery.

Why did he reach this conclusion? Two reasons: (1) the site of the amputation, and (2) the report of surgery, which showed no bleeding when the tourniquet was removed; hence there was a blockage of the artery above the amputation.

This conclusion is curious in view of the medical records and the testimony of Dr. Westphal, the attending surgeon.

As Dr. McParland noted, Crenshaw was seen by a number of physicians. The medical records reveal a chain of events beginning with a man reporting to the Emergency Room complaining of *an injury to his foot,* observations of progressive worsening of that injury and complications therefrom, efforts to abate or cure the problem, with the final progression up the lower leg to the critical state of gangrene and necessity of amputation. None of the records suggested Crenshaw's problem orginated with, or was solely a clot beginning above the amputation site. Rather, they relate directly to a problem beginning with a foot injury which rather rapidly deteriorated over a period of a few days.

As to the amputation site, Dr. Parland's first contention, Dr. Westphal testified this site was chosen for function and the fact the gangrenous condition had progressed far enough up the foot to indicate six inches below the knee was the safest place. There is nothing in the medical records or Dr. Westphal's testimony suggesting that prior to

surgery the decision to amputate below the knee was based upon a medical diagnosis or suspicion there was an occlusion at the kneeline or above.

Dr. Westphal testified no firm conclusion could be made about the blood vessels following the amputation because a tourniquet had cut off the blood flow for a significant period of time prior to surgery. Dr. McParland in his surgery never used tourniquets. Also to be remembered is this tourniquet was applied to a seriously atherosclerotic patient.

Demolishing Dr. McParland's contention that there was no flow below the amputation site, there is first the January 14 finding by Dr. Locker, the chief resident in vascular surgery, of a popliteal pulse which grew weaker downstream. Dr. Westphal testified the popliteal pulse found by Dr. Locker was "strong," according to the record. Second, and most conclusive, was Dr. Westphal's testimony, uncontradicted in the record, that on the day prior to surgery he obtained a blood pressure, albeit greatly weakened. Although discounted by Dr. McParland as "worthless," Dr. Westphal also testified a fluorescin dye injection on the day prior to surgery showed a line of demarcation of blood flow from the back of the foot to the back of the ankle.

Dr. McParland ignored Dr. Westphal's personal finding of a pulse on the day prior to surgery.[9]

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[9] Well, not quite. The circuit judge, apparently detecting the omission by Dr. McParland of this observation made by Dr. Westphal in reaching his opinion, questioned Dr. McParland in chambers out of the presence of the jury. There the circuit judge noted Dr. Westphal had found blood pressure the day prior to surgery. Dr. McParland's first response was this finding was not in the medical records. The court then asked Dr. McParland was he saying Dr. Westphal found no pulse. Dr. McParland replied—he was not saying Dr. Westphal found no flow, but if Crenshaw had had the kind of flow Dr. Westphal found, then he would not have

This Court takes no pleasure in any insurance company having to pay punitive damages. We affirm such an award with extreme reluctance. Yet an insurance has a duty to the insured to make a reasonably prompt investigation of all relevant facts. It has a further duty, after an adequate investigation and a realistic evaluation of the claim, to tell the insured, its customer, the plain truth. And, if the insurance company cannot give its insured a valid reason for denying the claim, it has a final duty to promptly honor it.

Conduct such as exemplified by Bankers Life in this case is harmful to the insured public. The company violated standards of conduct enunciated by this Court. It grossly violated its own in-house procedure for investigating a claim. Its executive personnel had to realize that a full and complete investigation posed a very strong likelihood of dissipating any contention that Crenshaw's trauma had

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required surgery. (R.1029-1032)

This brings us full circle. Dr. McParland never saw Crenshaw. Dr. Westphal did. Unless Dr. Westphal was either mistaken or committed perjury, he detected a pulse. This was a fact Dr. Westphal personally observed (and not McParland's prerogative to deny), which sent up in smoke Dr. McParland's opinion there was no blood flow below the amputation site.

Did Dr. McParland then concede, in the face of an eyewitness account of blood flow, that he himself might be mistaken in his opinion that there was no flow below the site? No, he said, "If there had been that kind of flow, he would not require surgery."

Having repeatedly testified the blood flow ceased above the site of amputation, and this being his sole basis for concluding a problem *above* this area brought about the necessity of an amputation, when brought face-to-face with a testified *fact* to the contrary, did he abandon his *opinion* that he was possibly mistaken?

No, rather than having been mistaken in his opinion, he said if that had been true, there would have been no need for surgery. We can thus understand the circuit judge's intrigue with Dr. McParland's testimony.

absolutely nothing to do with the loss of limb. Yet they simply denied the claim for an invalid reason, especially deceptive in this case, because *on the surface* and to the uninitiated it appeared valid. Why did they not fully investigate so that their doctor would have all the facts? Was it *because* they thought the full facts would be *favorable* to them, or *unfavorable*? We must conclude the latter. They clearly recognized they were skirting a bad faith cause of action, but still played the odds.

Conduct of an insurance company not authorized by law which carries with it a potentiality of great harm to the insurance public is an outrage, and should be condemned. Punitive damages in such a case is an appropriate, and perhaps the only remedy. In this kind of case, it is the medicine most likely to cure the malady.

VOIR DIRE, TESTING QUALIFICATIONS OF EXPERT

In the voir dire inquiry of Dr. McParland's qualifications, he was asked if he knew Marlene Tobin, and replied, "Yes." Then, he was asked if he knew Lillian or John J. Hamparian, to which he responded he did not recall the name, but might know them. Then he was asked if they had not sued him. He replied he did not know about Hamparian, but there was a suit just instituted, ". . . she didn't sue me; she sued ten doctors . . . and I was not the doctor attending her at the time that that suit was instituted." (Vol VII, pp.955-956)

He was asked what the suit was about, how it was he was sued, and he replied Dr. Donald D. Dwyer was the attending physician. When asked her problem, he replied she was a 40-year-old woman who developed cancer and

had a lot of other problems. All the above testimony was elicited without objection.

Dr. McParland was then asked, "What about Marlene Tobin?" An objection to this question was sustained. Counsel then asked the doctor if he had been sued by anybody else, to which he responded, "Once." There was then an objection, which was overruled, and Dr. McParland replied that he had been one of the doctors sued in an anesthetic death that had occurred a number of years before, he could not recall when.

Bankers Life argues the above was improper voir dire but counsel has failed to favor us with any case in point.

Most of this testimony was elicited without objection, following which there was an objection to a question, which was sustained, but no motion for a mistrial. We are therefore confined to the question of whether reversible error was committed in the doctor's answer to the final question.

Dr. McParland was offered as an expert on the human anatomy. If there was anything about his past conduct which reflected his knowledge, clearly it was admissible. See: *Wood v. American Life Ins. and Trust Co.*, 7 How. 609 (Miss. 1843), P.631: ". . . when particular credit is concerned, particular inquiries are proper." The question is whether such past conduct was relevant to the inquiry.

In this case the questioning never proceeded to the point where it is clear, one way or another, that the one suit affected his knowledge in the capacity in which he was testifying.

In hindsight we can observe it would have been preferable for the inquiry concerning the litigation in which Dr. McParland found himself a party defendant to have been conducted in chambers in order to ascertain whether such suit in any way bore upon his professional qualification to express an opinion. No such request was made, however.

In inquiries of this nature, trial courts are given broad discretion, and there must be a showing of an abuse to warrant a reversal. See: 3A Wigmore, *Evidence* (Chadbourn Rev. 1970), Section 991, pp. 922-926; Jones *The Law of Evidence* (6th Ed.), Vol. 2, §14:30, p. 668. We cannot find an abuse of discretion on the part of the trial court, and even if there were, it was not reversible error. In these litigious times the mere fact some person has been sued hardly affects either his reputation or credibility.

AFFIRMED.

Date Circulated: May 23, 1985

PATTERSON, C.J., ROY NOBLE LEE, P.J., DAN LEE, SULLIVAN AND ANDERSON, JJ., CONCUR. ROBERTSON, J., WALKER, P.J., AND PRATHER, J., DISSENT.

SULLIVAN, JUSTICE, FOR THE COURT, PART II:

Bankers Life argues that the amount of damages awarded—$1,600,000—is grossly excessive and should be substantially reduced. The point is brought before us by Bankers Life's assignment that the trial judge erred when he denied Bankers Life's post-trial motion for a remittitur of punitive damages or, alternatively, a new trial on the amount of punitive damages.

This issue must be adjudged under the same process of adjudication as is applicable on any other assignment of error. This involves the familiar three-step process of identifying and articulating the applicable rules of law, resolution of all questions of evidentiary fact, and application of the law to the facts. See *Boardman v. United Services Automobile Association*, 470 So.2d 1024, 1029 (Miss. 1985)

With regard to punitive damages, our rules are necessarily general. Once it is established that punitive damages in some amount should be allowed, the quantum thereof is determined by reference to certain general factors which include:

(1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future, *Standard Life Co. of Indiana v. Veal,* 354 So.2d 239, 249 (Miss. 1977);

(2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses. *Reserve Life Insurance Co. v. McGee,* 444 So.2d 803, 808 (Miss. 1983); *T.C.L., Inc. v. LaCoste,* 431 So.2d 918, 923 (Miss. 1983); *Tideway Oil Programs, Inc. v. Serio,* 431 So.2d 454, 460 (Miss. 1983); *Snowden v. Osborne,* 269 So.2d 858, 860 (Miss. 1972); and

(3) The pecuniary ability or financial worth of the defendant, *Collins v. Black,* 380 So.2d 241, 244 (Miss. 1980); *Allen v. Ritter,* 235 So.2d 253, 256 (Miss. 1970); *Standard Life Insurance Co. of Indiana v. Veal,* 354 So.2d, 239, 249 (Miss. 1978); *Jones v. Carter,* 192 Miss. 603, 610, 7 So.2d 519 (1942).

Punitive damages are an important component of the remedial side of our law whose purpose is the protection of the customer. On these facts our law would seem to authorize a quantum of punitive damages to be that amount reasonably necessary to punish defendant and to provide a substantial deterrent to it and others similarly situated from the commission of similar offenses, all consistent with the pecuniary ability and financial worth of the defendant. In this context, we note that Bankers Life reported to the Commission of Insurance in its 1980 report total assets in excess of $1,300,000,000, and net assets of approximately $294,000,000.

Our case law is to the effect that the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury. *See e.g., Commodore Corp. v. Bailey,* 393 So.2d 467, 471 (Miss. 1981);*Collins v. Black,* 380 So.2d 241, 244 (Miss. 1980); *Sandifer Oil Co. v. Dew,* 220 Miss. 609, 71 So.2d 752 (1954); *Teche Lines, Inc. v. Pope,* 175 Miss. 393, 166 So.2d 539 (1936). These same cases, frequently in the same sentence as has been used to commit sole discretion to determine the amount of punitive damages to the jury, use language expressing a view to the effect that the jury's verdict may be interfered with if it is found "arbitrary or unreasonable" or "against the overwhelming weight of the evidence". *Commodore Corp. v. Bailey,* 393 So.2d at 472. Other cases recognize that a jury's finding on amount of punitive damages may be disturbed "for exceptional causes". *Collins v. Black,* 380 So.2d at 244; *Snowden v. Osborne,* 269 So.2d 858, 861 (Miss. 1972); *Woodall v. Ross,* 317 So.2d 892, 896 (Miss. 1975).

Our general rule is that a damage award is so excessive that it should be altered or amended when it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience. *Jesco, Inc. v. Shannon,* 451 So.2d 694, 705 (Miss. 1984); *Entex, Inc. v. McGuire,* 414 So.2d 437, 444 (Miss. 1982); *James Reeves Contractor, Inc. v. Chain,* 343 So.2d 1229, 1232 (Miss. 1977). This shock must be experienced by the judicial conscience, not the actual conscience of the members of this Court. *Schoppe v. Allied Chemicals Division,* 418 So.2d 833 (Miss. 1982), (contrast amount of verdict with amount of actual damage). We are not authorized to disturb a jury verdict regarding amount of damages because it "seems too high" or "seems too low". *Toyota Motor Co., Ltd. v. Sanford,* 375 So.2d 1036, 1037 (Miss. 1979).

Where this test is met, the trial judge is authorized generally to enter a remittitur or an additur as may be appropriate under the facts and circumstances of the par-

ticular case. [Miss. Code Ann. §11-1-55 (Supp. 1984)]. This authority to enter a remittitur or an additur exists where the nature of the damage award at issue is punitive or exemplary. See *Standard Life Insurance Co. of Indiana v. Veal*, 354 So.2d 239, 249 (Miss. 1977) (rule impliedly recognized). We hold that motions challenging the quantum of punitive damages and seeking either a remittitur or an additur are subject to the same rules as motions challenging the amount of damage awards generally. This means that on appeal we are reviewing a matter which is by its very nature committed to the sound discretion of the trial judge. See *Jesco, Inc. v. Whitehead*, 451 So.2d 706, 714-716 (Miss. 1984) (Robertson, J., concurring). What in essence we are dealing with is a motion for a remittitur or in the alternative for a new trial on the issues of damages only. Where the trial judge acts upon these matters, we reverse only if the trial judge abuses or exceeds his discretion. *Dorris v. Carr*, 330 So.2d 872, 874 (Miss. 1976).

While no hard and fast rule may be laid down with regard to the maximum amount of punitive damages which may be awarded in a given case, it is difficult to imagine that, consistent with the rules of law recited above, the judicial conscience could be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant. The record reflects that the net worth of Bankers Life in the year immediately preceding the trial was $294,000,000. The amount of punitive damages assessed by the jury was $1,600,000 or 0.54421% of the net worth of the company. However high that amount may "seem", it may not, consistent with our rules of law in the area, be said to shock the judicial conscience.

AFFIRMED.

PATTERSON, C.J., ROY NOBLE LEE, P.J., DAN LEE AND ANDERSON, JJ., CONCUR. HAWKINS, J. DISSENTS. ROBERTSON, J., WALKER, P.J., AND PRATHER, J., DISSENT.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW
DECIDED SEP 11, 1985

HAWKINS, JUSTICE, DISSENTING AS TO PART II:

This case gives me a special empathy with Moses. Having nursed the children of Israel for forth years in the wilderness, and against all expectations and insuperable odds, miraculously delivering them to Canaan's boundary, he was not permitted to go in with them. He went somewhere off in Moab and quietly expired. (Deuteronomy, 34)

While neither the travails of this case nor my puny talents remotely approach that historic figure, at least I do know how old Moses is bound to have felt that day.

In what I hope just as modest but not a terminable way I must part company now with my colleagues at the very end of this legal adventure. I simply cannot come to any conclusion but that a $1,600,000 punitive damages award was grossly excessive, and could have resulted only from prejudice or passion, or a misconception of the law, of the jury.

Of course, while those twelve citizens of Jackson County would not have been quite normal not to have had some dyspepsia or bile enlargement from Bankers Life's con-

duct, that very irascibility carried them to a grossly excessive award, in my view. Their reason was somewhat dissipated by their annoyance, thus the size of the verdict.

The scholarly opinion of the majority has given us a comprehensive and concise statement of punitive damages law. The decisions they cite I would cite as authority in reducing the award. Our difference comes in the application of these decisions, and our sense of proportion on the amount. I think the majority has considered only the net worth of Bankers Life.

Punitive damages decisions from this Court are not numerous, but clear principles are nonetheless discernible. They are that punitive damages are not a matter of right, but are granted as punishment, and to set an example to deter others who might otherwise be similarly inclined. The reason for the award, being neither a matter of compensation nor of right, is to reward the plaintiff for the public service rendered in successfully bringing the action. A jury cannot be directed to award any sum as punitive damages. They can only be authorized under proper instructions to consider the proprietary of some punitive damage award. Finally, the amount of the award is solely within the discretion of the jury, and will not be disturbed unless for "exceptional causes" or the amount is arbitrary or unreasonable. These principles may be found in the following cases: *Yazoo & Miss. Valley Railroad Co. v. Williams,* supra: *Hines v. Imperial Naval Stores,* 101 Miss. 802, 58 So. 650 (1912); *Yazoo & M.V.R. Co. v. May,* 104 Miss. 422, 671 So. 449, 450 91913); *Fowler Butane Gas Co. v. Varner,* 141 So.2d 226, 233 (1962).

These punitive damages principles were summarized in *Snowden v. Osborne,* supra, at 860-861:

> . . . They are granted in the nature of *punishment* for the wrongdoing of the defendant and as an *example* so that others may be deterred from the

> commission of similar offenses thereby in theory protecting the public [citations omitted]
>
> * * * * *
>
> The basis in awarding such damages to the injured party is that of *rewarding* an individual for public service in bringing the wrongdoer to account. [Emphasis added]

We also stated in that case that the amount was discretionary and should not be interfered with unless for "exceptional causes." See also, *Veal*, supra, at 247.

Three basic ingredients are therefore before the jury to be weighed, balanced and harmonized: punishment, public example and reward to the plaintiff. Each is essential, and it has never been suggested by any authority in this state than either one of these is more important than the other. The final verdict should be a fair balance of the three under all the circumstances of the case.

Then what part does the wealth of the defendant play? It is only relevant in determining an amount that constitutes meaningful punishment, and by no means the only relevant consideration under punishment, to which I will return. And, of course, it has nothing whatever to do with public example or reward to the plaintiff.

While I certainly agree with the majority that the net worth of Bankers Life makes it obvious that to constitute meaningful punishment, Bankers Life requires more monetary penalty than a filling station attendant, or a Piggly Wiggly store owner, I cannot agree with the concept the bigger they are the more we ought to zap them. The distinction may be somewhat subtle, But I believe this Court stated it in *Yazoo & M.V.R. Co. v. Williams*, supra, at 492:

> It is suggested in argument that the wealth of the wrongdoer may be shown in evidence, in or-

> der to permit the jury to consider that wealth in determining the amount of punitory damages to be awarded. This is true, but only upon the idea already advanced, that the jury *may gauge the amount of punishment necessary to be inflicted in order to deter a repetition of the offense; but it is in no proper sense intruduced as testimony to influence the verdict.* [Emphasis added]

In *Allen v. Ritter*, 235 So.2d 253, 256 (Miss. 1970); and *Collins v. Black*, supra, at 244, we plainly stated that pecuniary ability to respond might be considered by a jury, about it was not the only factor to be considered.

Under the principles announced in our decisions, the jury should be searching for an award which does the following: constitutes a meaningful punishment to the defendant, sets a public example, and rewards the plaintiff, and as above stated, these factors carry equal weight. There should be a harmonizing of the three factors, not some sum which shows only one factor has been considered (and it to influence the amount of the verdict), and the other two ignored.

If there is a remote possibility in the future of an inclination on the part of any individual to look mindly upon my tenure on this Court, I hope I am remembered for the awe and reverence I exemplified for the jury system.[1] My profound deference to the jury system, however, has not blinded me from what is obvious here: this jury paid no

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[1] Nothing a few examples, I have been in a decided minority in the following contentions: *Wilson v. State*, 395 So.2d 957, 961 (Miss. 1981), an accused should be entitled to a jury trial on whether he is a habitual offender; *Parker v. State*, 401 So.2d 1281, 1286 (Miss. 1981), an accused should never be deprived of having a jury decide his plea of self-defense; and *Hill v. State*, 432 So.2d 427, 542 (Miss. 1983), an accused in a capital murder case, and his jury, have a right to be told that regardless of the evidence, the jury has the power under our law to sentence him to life imprisonment rather than death.

more attention to the last two factors in reaching their verdict than to some Jackson County swamp rabbit.

Insofar as setting an example for others similarly inclined, a punitive damages award one-fifth the size of this would set off warning gongs and flashes in the headquarters of every insurance company in this country. Likewise, I certainly favor rewarding the plaintiff and his counsel for the service they have rendered this state in bring this action.[2] But, an award of $1,600,000?

And even as to a punishment, while the proof indicates Bankers Life can certainly respond to this amount in damages, does that mean it took anything approaching this sum to constitute meaningful punishment? To make them quit this practice? If a fraction of this sum would not teach this company a lesson that would remain forever silhouetted along the skyline of Bankers Life's memory, then it has no business in being in business.

In my view the wisdom of punitive damages, the rare instances when they should be awarded, and factors to consider in the amount, have evolved through two centuries of human experience. If we suddenly warp and distort these principles by ignoring some, and stretching others out of proportion, salutary punitive damages awards will not be simply rare, as they now are (and should be); they will be replaced. this case will be Exhibit A in the argument of all those who wish to do away with punitive damages altogether, reduce them to some meaningless penalty, or create an impossible standard to make any punitive damage award.

It is pertinent to not the original declaration filed January 11, 1980, asked for $400,000 punitive damages. It

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[2] I am quite aware plaintiff's counsel spent many hours on this case, but I doubt if he put in any more than some members of this Court have.

was amended November 27, 1981, four days before trial, to ask for $1,635,000 in punitive damages.

Also, the circuit judge refused a direct remittitur, but the significance of this refusal is diminished because he was erroneously of the view he had no authority to reduce the award. What he might have done had he been required to maturely reflect upon the matter we cannot know.

Of course, net worth is relevant on what constitutes *meaningful punishment.* In *Veal,* supra, on a punitive damage award of $50,000, we noted the company has worth $85 million. In *Reserve Life,* supra, on a punitive damage award of $152,000, we noted the company had a net worth of $102 million. Here, as the majority notes, Bankers Life had a net worth of $294 million.[3]

Yet considering just punishment, all attendant circumstances are proper considerations, not just net worth. Some of the other pertinent considerations are the degree of the offense, and whether there was malice, *Snowden,* supra, at 861; motive, *Will v. Hughes, 238 P.2d 478, 172 Kan. 45 (1951); Wrains v. Rose,* 175 So.2d 75 (Fla. 1965); the injury intended, *Booth v. Kirk,* 381 S.W.2d 312, 317 (Tenn. App. 1964); *Hildreth v. Hancock,* 41 N.E. 155, 156 Ill. 618 (1895); public sense of justice and propriety, *Shutz v. Morris,* 201 S.W.2d 144 (Tex. Civ. App. 1947).

Thus, even if the only factor to be considered was a meaningful, just punishment, I would think, just as important as the net worth of Bankers Life is the fact that as far as this record shows, this is the first time this company has been sued for punitive damages in this state, the plaintiff has never contended Bankers Life is more

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[3] In *Wagner v. Gibbs,* 80 Miss. 53 (1902), in affirming a punitive damage award of $2,000 against a defendant who had given a minister of the gospel a first-class whipping, the Court noted the defendant was worth $200,000.

than a first offender. Can we do nothing when upon its first offense the jury zaps the company $1,600,000?

We have stated that a punitive damage award should not be disturbed unless for exceptional causes," *Yazoo & M.V.R. Co. v. Williams,* supra, at 491; *Snowden,* supra, at 861; or it is "arbitrary or unreasonable." See *Commodore Corp. v. Bailey,* 393 So.2d 467 (Miss. 1981). This case falls squarely within both authorities. The award clearly ignored considering what amount would sufficiently constitute a public example and warning as well as a fair reward to the plaintiff. It grossly exceeds a sum necessary to constitute some meaningful punishment to Bankers Life in this case. While at first blush the majority's view might appear reasonable, this is precisely what it is, a cursory examination; it simply will not survive analysis and scrutiny.

The majority has also left me with the statement that the amount of the award must shock the "judicial" conscience, not the "actual" conscience. I lack the sophistication to discern the distinction between the two. I have enough trouble with the one I've got, and it would not rest comfortable if I remained silent on the amount of the award.

I would by proper remittitur reduce the amount to a award of $750,000 punitive damages. In so doing, we would still be showing deference to the trial jury.[4]

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[4] The majority correctly recognizes our authority to direct a remittitur in a punitive damages award. Nothing in Miss. Code Ann. § 11-1-55 restricts that section to actual damages. Furthermore, there is common law authority in both trial and appellate courts, to avoid the expense and delay of a new trial, to direct a remittitur. In *Gulf Atlantic Life,* supra, the Alabama Supreme Court remitted a $1,100,000 verdict to $100,000. *Dimick v. Schiedt,* supra; cases cited under 25A C.J.S. and *Curtis Publishing,* supra. Our only disagreement is in whether Miss. Code Ann. § 11-1-55 should be applied in this case.

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW

ROBERTSON, JUSTICE, DISSENTING:

I. Why In A Nutshell I Dissent

If in the course of a home auto repair project, one drops the alternator on one's big tow, no doubt that would hurt. A soft tissue injury, perhaps even a broken tow might result. Yet it seems a bit farfetched that such an accident, ten days later, would necessitate amputation of the right leg six inches below the knee. It is hardly reasonable that one seeking a monetary award based on such a causal connection should be required to prove it. Yet because it did just that and exercised a right I should have regarded as vested in it by our law, Bankers Life and Casualty Co. finds itself today assessed $1,600,000.00 in punitive damages with no apparent alternative except payment.

I dissent. I dissent, with the greatest respect for my colleagues in the majority and hope it not be thought disrespectful nor found inappropriate that I pointed point out the major errors found in the opinion of the Court.

To begin with, Bankers Life denied Lloyd Crenshaw's claim in reliance upon the opinion of its medical director, Dr. Nathaniel P. McParland, a specialist in vascular dis-

eases and surgery, with credentials and experience far in excess of that possessed by Plaintiff Crenshaw's doctors. Dr. McParland's opinion was that the physical findings and post-surgery pathology report reflected that the *sole* cause of the amputation was a pre-existing arteriosclerotic condition in Crenshaw's leg. This was Dr. McParland's opinion when he first reviewed the medical records and it remained his opinion at trial. Such a medical opinion ought be recognized as affording an insurer an arguable reason for refusal to pay Crenshaw's claim.

When he gave his original pre-suit opinion, Dr. McParland did not have all of the medical records (including the emergency room record which suggested an initial trauma). The majority implies that with sinister motives Bankers Life's claims department withheld pertinent medical records so that Dr. McParland would render an opinion favorable to the company's position. All of this is seen as much ado about nothing in that Dr. McParland made clear from the witness stand at trial that he had (some two weeks earlier) reviewed *all* of the medical records and that the "new" records served only to confirm his original opinion.

The majority complains that before suit was filed Bankers Life denied Crenshaw's claim on the authority of a policy provision, literal enforcement of which had been precluded by our prior decision in *Peerless Insurance Co. v. Myers,* 192 So.2d 437 (Miss.1966). The argument is so much judicial legerdemain. A careful reading of the three letters involved will reflect that in each Bankers Life denied the claim because it believed that the *sole* cause of the amputation was the pre-existing arteriosclerosis (which *everyone* agreed Crenshaw had) in the leg unexcited by trauma. This view of the ultimate facts derives from the opinion of Dr. McParland. Nothing in *Peerless* or in any other case decided by this Court precludes an insurer's denial of such a claim on such facts.

The opinion of the Court then steps wholly outside its adjudicatory function and degenerates into pure advocacy as it seeks to discredit the testimony of Dr. McParland. Significantly, the majority never hints that Dr. McParland was not "qualified" to appear as an expert witness or that his opinion testimony was not competent to go to the jury, nor that Crenshaw was entitled to a peremptory instruction in his favor on the liability feature of the underlying policy claim, notwithstanding Dr. McParland's testimony. Instead, the majority vigorously "cross-examins" Dr. McParland and then makes a jury argument that the good doctor's opinion is flawed. What the majority ignores is that, where the question procedurally is whether a j.n.o.v. should have been granted, there is no case known to our jurisprudence which sanctions this method of evaluating a key witness' testimony.

The majority opinion treats curiously our decision of only a few months ago in *Blue Cross and Blue Shield of Mississippi, Inc. v. Campbell,* 466 So.2d 833 (Miss.1984). There we held that in the "vast majority of cases" the insured's claim for punitive damages should not be submitted to the jury where the plaintiff insured is *not* entitled to a peremptory instruction on the liability feature of the underlying contract claim. 466 So.2d at 843. We reiterated that holding in *State Farm Fire & Casualty Co. v. Simpson,* ___ So.2d ___, ___ (Miss.No.54,606, dec. August 14, 1985). If applied to the case at bar, the *Blue Cross/State Farm* rule would require reversal. The majority, however, ignores this central thrust of *Blue Cross* and *State Farm,* never bothering to suggest why this case is not one of the "vast majority", and instead cites and quotes from a portion of the *Blue Cross* opinion not followed by the trial judge here, with respect to which no one (least of all the majority opinion) has suggested error, and having no discernible relevance to the adjudication of the case at bar.

Finally, the majority seems to hold that an award of punitive damages to a plaintiff insured need only be pred-

icated upon an authoritative finding that, objectively speaking, the insurer had no arguable reason for denial of the claim. In so doing the majority (a) modifies (albeit sub silentio) several prior decisions of this Court which impose a much heavier burden upon one who would recover punitive damages and (b) establishes a substantive rule by reference to which an insurer may become subject to an assessment of punitive damages wholly *different from* and *lesser than* that applicable in all other punitive damages cases, without offering any reason why assessment of punitive damages in bad faith refusal cases should be measured by standards other than those applicable generally.

In the end I would reverse and render so much of the judgment below as assesses punitive damages in favor of Lloyd Crenshaw and against Bankers Life. When our heretofore existing rules of law are applied to the case at bar, and when passion and prejudice are excised, I suggest with deference that reversal can be the only result. I would affirm the award of $20,000.00 on Crenshaw's underlying policy claim and, for reasons explained below, add thereto pre-judgment interest, reasonable attorneys fees and reasonable legal expenses.

II. Bankers Life Had An Arguable Reason For Its Refusal To Pay Crenshaw's Claim

A. Bankers Life Reasonably Relied On The Opinion Of Its Medical Director That The *Sole* Cause of Amputation Was Pre-Existing Arteriosclerosis

Bankers Life and Casualty Company did not rely merely upon the intuitive implausibility of Lloyd M. Crenshaw's claim when it denied that claim, pre-suit and at trial. Rather, Bankers Life consulted a highly qualified specialist[1]

[1] Dr. Nathaniel P. McParland of Chicago was the only medical witness who was a specialist in vascular surgery. He was the senior consulting surgeon at two hospitals. He was a member of the Board of American College of Surgeons, and had been a resident in vascular surgery at

in vascular diseases who—pre-trial and at trial—gave an unequivocal opinion that the *sole* cause of the amputation of Crenshaw's leg, as distinguished from the pain and soreness in his big toe, was a preexisting arteriosclerotic condition. This was no idle expert opinion. Every shred of medical evidence on the point reflected that the 61-year old Crenshaw had long suffered progressively worsening arteriosclerotic changes in the blood vessels of his right leg. Well prior to January 6, 1979, Crenshaw's years as a chain smoker had played a substantial part in producing the condition, the net effect of which was that the blood flow into Crenshaw's right leg had stopped below the knee. Because of the blood stoppage near the knee, any trauma to the big toe could not have borne a causal connection to the subsequent amputation.

Dr. McParland illustrated the point quite simply. The claim that trauma to Crenshaw's big toe caused the blood stoppage below the knee would be similar "to dropping a tree in a dry river bed and saying that two miles up the stream there is no water because it's the tree's fault". Dr. McParland was of the opinion that, if the falling alternator had been the culprit, at most only a part of the foot would have had to be amputated. Only the preexting severe arteriosclerotic conditions could have required the amputation which was in fact performed.

Confirming the intuitive view that dropping an alternator on one's big toe should not lead to the amputation of one's leg and broadening our perspective, Dr. McParland made clear that arteriosclerosis frequently leads to amputation *sans* trauma.

> Q. Doctor, is it probable, to a medical probability, that one could suffer a severe arterioscle-

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two hospitals in Illinois prior to entering into practice of general and vascular surgery in Chicago in 1960. His practice was predominately vascular.

> rosis condition and have to undergo limb amputation without the onset of trauma?
>
> A. That's the usual.

Generally speaking, only trauma of bone-crushing proportions (which Crenshaw's trauma clearly was not) leads to amputation[2]

Substantial evidence in the record supported Dr. McParland's opinion as to the cause of the amputation. The surgeon's report indicated no bleeding when the tourniquet was removed following the surgery. The pathology report of the amputated stump concluded

> Right foot and lower leg: severe arteriosclerosis of the arteries. Gangrenous necrosis.

This strongly supports Dr. McParland's ultimate opinion regarding causation.[3]

The proper context for understanding the issues tendered begins with acceptance of the notion that the unanimous opinion of the medical experts was that the

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[2] The implication of Dr. McParland's testimony, not even thinly disguised, is that, *if* immediately prior to January 6, 1979, Lloyd Crenshaw had sufficient blood flow (and hence pulse) in his lower right leg so that amputation was not imminent in the normal course, and *if* on January 6 Crenshaw experienced a trauma as he described at trial, and *if* ten days later his right leg was amputated six inches below the knee, then Crenshaw upon recovery from the amputation should have been investigating a likely claim for medical malpractice rather than suing Bankers Life for punitive damages. By this I do not wish to be understood as having concluded that the doctors who attended Crenshaw were guilty of malpractice, only that the logical extension of Dr. McParland's argument seems to my mind to bolster the arguableness of Bankers Life's only expressed reason for denial of Crenshaw's claim.

[3] Dr. McParland's testimony is discussed in much greater detail at pages 23-26 of the majority opinion and that discussion ned not be repeated here.

arteriosclerotic disease suffered by Crenshaw in his right leg was even on the view most favorable to Crenshaw, *an* underlying cause of the amputation. The only issue was whether this pre-existing disease was the *sole* cause of the amputation or whether it combined with accidental trauma to cause the amputation.

Of substantial importance and relevance is the testimony of Dr. Christopher T. Westphal, an Air Force general surgeon who performed the surgical amputation.[4] While he was of the opinion that the trauma was a precipitating cause of the amputation, together with the preexisting arteriosclerotic condition, Dr. Westphal conceded the plausibility of Dr. McParland's opinion. Employing terms taken from the majority opinion, Dr. Westphal said that Dr. McParland's thesis was "perfectly conceivable" (p.19), a "possibility" (p.20), and that

> one [such as Dr. McParland] could say it was a coincidence that he [Crenshaw] had trauma, and would have lost his extremity, anyway; . . . (p.20)
>
> Dr. Westphal never questioned that Crenshaw had a preexisting arteriosclersis causing a decrease to the blood flow in his right leg.[5] (p.22)

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[4] In the context of the legal point on which this case turns, to-wit: the "arguable reason" point, I regard it as important that, speaking qualitatively and quantitatively, the training, experience and other credentials of Dr. Westphal were substantially *less* than those of Dr. McParland. Dr. Westphal had graduated from medical school as recently as 1976 and had "been involved in internship and residence in general surgery at Keesler Medical Center". At the time he testified, he was not a member of any medical society other than the Air Force Society for clinical Surgeons. He was planning to take the written portion of his Board certification examination at the time he testified. He was the young, recently-graduated resident who did the amputation. Dr. Westphal had no experience in the sub-specialty of vascular diseases or vascular surgery.

[5] Dr. Westphal's testimony is summarized in full on pages 19-22 of the majority opinion and need not be repeated here.

> The third and final medical witness at trial was Dr. Hockaday, a general surgeon practicing in the Pascagoula area without substantial experience or expertise in vascular diseases. Dr. Hockaday was of the opinion that the amputation was caused by the combined operation of trauma and the preexisting arteriosclerosis.[6]

B. While The Verdict He Obtained Is Beyond Attack, Crenshaw Was Not Entitled To A Peremptory Instruction In His Favor On Liability Phase Of His Underlying Policy Claim

At the risk of stating the obvious, a point needs to be made here: With respect to the basic claim of Lloyd Crenshaw for benefits under the Bankers Life policy, there was a substantial dispute or difference of opinion among the medical experts as to whether Lloyd Crenshaw's dropping the alternator on his big toe bore a sufficient causal connection with the amputation so that policy benefits were payable. The jury resolved that dispute in Crenshaw's favor and, no doubt, because of the credible testimony of Drs. Westphal and Hockaday, the jury's determination in that regard is unassailable. *Paymaster Oil Mill Co. v. Mitchell,* 319 So.2d 652, 657 (Miss.1975).

The converse is likewise true. If the jury had returned a verdict in favor of Bankers Life on the liability phase of the underlying contract claim, that verdict too would have been beyond attack. *Paymaster Oil Mill Co. v. Mitchell,* 319 So.2d 652, 657 (Miss.1975). To put the point another way, when at the conclusion of the evidence at trial Crenshaw requested a peremptory instruction on the liability feature of the underlying contract claim, that request was and necessarily had to be denied. Applying the *Pay-*

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[6] Dr. Hockaday's testimony is summarized at pages 17-19 of the majority opinion and need not be repeated here.

master Oil rule, we should surely have reversed had the trial judge granted any such peremptory instruction.

We see nothing in the majority opinion which questions this view of the evidence. Indeed, the majority's quite fair and evenhanded description of the expert testimony (pp.17-26) belies the possibility of any such peremptory instruction having been appropriate.

A related notion bears emphasis. Nothing said anywhere in this opinion proceeds upon or may be shown to depend upon acceptance of the proposition that Dr. McParland's opinion regarding the cause of Crenshaw's amputation was correct. Rather, the premises upon which this opinion rests are (a) that Dr. McParland was a qualified medical expert witness, see *Hall v. Hilbun,* 466 So.2d 856, 873-74 (Miss.1985); *House v. State,* 445 So.2d 815, 822 (Miss.1984), (b) that all necessary predicates to admissibility of his opinion regarding causation of the amputation were laid, (c) that Dr. McParland opined that the *sole* cause of the amputation of Crenshaw's leg was the arteriosclerotic disease process existing pre-January 6, 1979, and (d) this opinion was of sufficient force that, if the jury had found for Bankers Life on Crenshaw's underlying contract claim (assuming all other proof at trial remained the same), neither the trial judge nor this Court consistent with *Paymaster Oil* and progeny would have had authority to order entry in Crenshaw's favor of judgment notwithstanding the verdict. Until error be shown in one or more of these premises, it seems to my mind that we should reverse and render so much of the judgment as assesses punitive damages against Bankers Life.

A positive statement of my view of the matter having been stated, back to the negative, an exposure of and exposition upon the majority's major errors.

C. Bankers Life's Basis For Denial Of Crenshaw's Claim Remained The Same From First Denial Through Trial

The innuendos in the majority opinion to the contrary notwithstanding, the day of trial was by no means the first time when Bankers Life denied the underlying policy claim by reason of the proposition that the amputation was caused solely by the preexisting arteriosclerotic changes within Crenshaw's right leg. The record reflects that Dr. McParland rendered his first opinion to Bankers Life on June 19, 1979, and that the opinion he gave at that time was precisely the same as he gave at trial. From the outset Bankers Life relied on the opinion of Dr. McParland and denied the claim *solely* on that basis.

The first time Bankers Life communicated its decision to deny the claim to anyone acting on Crenshaw's behalf as the July 11, 1979 letter William Herzau wrote to Crenshaw's employer in Pascagoula.[7] That letter stated in pertinent part that

> according to the medical information we have, it appears that Mr. Crenshaw's limb loss was because of severe arteriosclerotic changes in his distal blood vessels and subsequent ischemia and necrosis. . . .

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[7] The majority opinion makes much of the fact that this claim denial letter includes a definition of injury which we had held unenforceable in *Peerless Insurance Co. v. Myers*, 192 So.2d 437 (Miss.1966). That the letter includes a reference to this definition is as true as it is irrelevant. The opinion furnished by Dr. McParland on June 19 was that the preexisting arteriosclerotic disease was the sole cause of the amputation. That opinion is paraphrased and summarized in the July 11, 1979 letter. There is nothing in either Dr. McParland's opinion or in the Herzau letter which indicates any view or understanding on the part of Bankers Life that any trauma in fact played any causal role leading to the amputation. Absent some indication in the letter that Bankers Life was of the view that the amputation was caused in combination by the arteriosclerotic changes and Crenshaw's dropping the alternator on his big toe, the reference to the *Peerless* rule is simply beside the point.

This was Bankers Life's first denial of the claim and the reason given was the same as that tendered at trial.

On April 8, 1980, Bankers Life wrote to Crenshaw again denying the claim. Again Bankers Life gave as its reason for denying the claim that

> according to all the medical information we have, it appears your limb loss was due to severe arteriosclerotic changes in the distal blood vessels and subsequent ischemia and necrosis. . . .

In this letter Bankers Life adds "This opinion was confirmed in the pathology report".[8]

A third pre-suit denial of the claim occurred on June 27, 1980, when Herzau wrote to Crenshaw's attorney and again gave as his reason that

> the operative report indicates the instructing arteriosclerotic area most likely is in the femoral or popliteal artery area although no mention of the femoral or popliteal pulses is noted.

At trial Bankers Life offered this same basis for its denial of Crenshaw's claim. See, for example, Mr. Lemersal at R.869:

Q. Why was Mr. Crenshaw's claim denied?

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[8] Again this opinion makes reference to the definition of injury mentioned in the previous footnote. Importantly, again nothing in the April 8, 1980 letter suggests in any way, shape, form or fashion that Bankers Life believed that there had been a trauma and was ignoring it and the *Peerless* rule. Indeed, there is touch of an inconsistency here in the majority opinion in that it complains at numerous points that Dr. McParland was not furnished with medical reports which would have reflected the fact of trauma. If that be true, Dr. McParland's pre-suit opinion could not have been infected by knowledge of trauma and, since Bankers Life was relying wholly on Dr. McParland's opinion, the denial of the claim could not in any way be predicated upon a *Peerless*-proscribed discounting of the trauma.

A. Because in the opinion of our medical director, the cause of the loss was a disease process.

Mr. Blessing at R.978:

Q. Now, what was the basis that you used in denying the claim? What did you tell Mrs. Doyle to tell Mr. Crenshaw?

A. According to the medical findings which our doctor reviewed, the cause of the amputation was *strictly* due to a disease process and not due to any injury.

Mr. Blessing at R.909:

Q. And the denial was based on Dr. McParland's report?

A. Yes, it was.

Mr. Herzau at R.925:

Q. If the alternator falling on the foot contributed to the injury . . . if the alternator was considered to be an injury and contributed to a problem, I would guess it should be paid. This is what I was questioning. This is what i was trying to determine.

Dr. McParland at R.978:

Q. Assuming there was trauma, from history, do you attribute any percentage of his loss to a trauma situation?

A. Absolutely none.

Q. And you conveyed your findings to the claims department at BAnkers Life?

A. I did.

In short, Bankers Life's pre-suit position remained consistent from July 11, 1979 forward. That position expressed in three separate letters to Crenshaw or his representatives was substantially indentical to the position

taken by Bankers Life at trial. It is disingenuous to suggest that Bankers Life ever relied on any basis for denying the claim other than the view that the sole cause of the amputation was the pre-existing arteriosclerotic condition in Crenshaw's leg.

D. The "Missing" Medical Records Merely Served To Confirm Dr. McParland's Opinion Regarding The Cause Of Amputation

The majority complains at length that Bankers Life failed to disclose to Dr. McParland all of the medical records in the case and particularly the emergency room report. This is much ado about nothing.

The majority opinion never makes quite clear just what it is that Dr. McParland would have learned from the medical records he did not have prior to trial that would have informed his opinion or would have been arguably inconsistent with his opinion. We can only presume that it is the fact of trauma, for it is true that at the outset Dr. McParland was proceeding on the assumption that there was no trauma. In this connection we note a sampling of the medical records regarding the history of Crenshaw's trauma and to begin with the emergency room report of January 9, 1979, states that Crenshaw "driving auto and hit pole with foot on brake". (p.3) On January 9, 1979, a clinical record states that Crenshaw "struck on ball right foot with rebounding clutch". (p.4) Then on January 14, 1979; a report stats that Crenshaw "injury to his right ankle in an auto accident". (p.7) Suffice it to say that these reports are not remarkable for their accuracy. Yet the majority says Dr. McParland should have had them.

Dr. McParland was cross-examined about this supposedly significant failure on the part of Bankers Life's claims personnel to furnish him all of the medical records. This exchange is revealing.

Q. Well, Doctor, the question I'm trying to get at is that you didn't get the full medical records of Lloyd Crenshaw until about two weeks ago; did you?

A. All those medical records . . . no, I didn't. Bul all they do is confirm the facts that *the man had no blood going down his leg.* It's just confirmation. It didn't add anything to the disease which was present, and the records are not going to change. What he had, he had. What he's got, he's got . . . and he's going to have it.

Q. And it's not significant to you at all the fact that Lloyd Crenshaw is sixty-one years of age, is an active person, worked up until the time of his amputation and then sometime thereafter as much as forty hours regularly every week, plays golf, goes dancing . . . that doesn't mean a thing.

A. No. I did the same operation on a professional dancer. It doesn't make much . . . you know, until its completely occluded, it doesn't make that much difference. You still have some blood supply.

Q. Doctor, would you agree with this? Is it possible to drop something on your foot to aid in occlusion? Is that possible?

A. It's possible if you break some bones and if you have a crushing injury.

Q. In other words, it would have to be a most crushing injury then.

A. Yes, it would. It's always associated with broken bones. *And if you don't have a pulse down there, it doesn't make any difference what you drop on it.* There's still no pulse, whether you drop in or don't drop it. *The*

surgeon said there was no blood going down there, and you can't change that.[9] (emphasis added).

We recognize, of course, that there is evidence in the record that may be seen in conflict with that which Dr. McParland relied upon. The majority notes evidence of a pulse below the amputation site. (Majority opinion, p.43, footnote 9). Coupled with the description given of the trauma experienced by Crenshaw on January 6, 1979, it also furnishes a basis for concluding that Crenshaw's attending physicians and surgeons may have performed an unnecessary amputation. In any event, for present purposes this merely furnished a basis for cross-examination of Dr. McParland and for argument to the jury that respecting Crenshaw's underlying policy claim, Dr. McParland's opinion should not be credited. Such evidence in no way undercuts the power of Dr. McParland's opinion to furnish Bankers Life with an arguable reason for its refusal to pay Crenshaw's claim.

The point is this. When Dr. McParland testified at trial, he had reviewed all of the medical records. His opinion remained what he had stated before: that the amputaiton was caused by the preexisting arteriosclerotic condition in Crenshaw's right foot. There is nothing in the fact of trauma, whether that consists of Crenshaw's dropping an alternator on his big toe or the variations thereof in the

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[9] In this exchange Dr. McParland explained once more his opinion that Crenshaw's amputation was due solely to arteriosclerosis. He noted in the operation report found in the initial medical records (P.Ex.7 at R.558) that there was "little free bleeding" found through the major arteries to the foot at the time of the amputation. Dr. McParland recognized that with little blood flow through these arteries at the point of the amputation there must have been an occlusion present somewhere near the beginning of the lower leg. Consequently an injury which allegedly occluded an artery in the foot would have had no effect since there would have been for all purposes no blood flow there anyway.

records recited above, which is necessarily inconsistent with what Dr. McParland stated. For this reason it is likewise of no great significance that these records were not furnished to Dr. McParland ab initio. While it would obviously be the better practice to furnish the physician who has to give an opinion in such matters all medical reports, one cannot on these facts say that this failure had anything to do with the opinion Dr. McParland originally reached or subsequently delivered by trial. What we have in a nutshell is an arguably sloppy practice which is of no practical or legal consequence here.

E. The Majority's "Discrediting" Of Dr. McParland Is Rank Advocacy

Of all of the errors in the majority opinion, the most egregious is that found at pages 39-43. It is here that the majority seeks to discredit Dr. McParland as an expert witness on behalf of Bankers Life. Various tactics are used. That Dr. McParland is a salaried employee of Bankers Life who derives approximately twenty percent of his income from work for Bankers Life is somehow seen as pernicious.[10] The majority goes on to cite the opinion of the other two doctors in the case as well as several medical texts to show that Dr. McParland was wrong. What becomes quickly apparent is that the majority opinion is a combination of a cross-examination of Dr. McParland and jury argument to the effect that the good doctor's opinion should not be credited. That such advocacy is inappropriate requires neither explanation nor citation of authority.

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[10] We cannot help noting the contrast between this case and our recent decision in *Blue Cross & Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss.1984). In *Blue Cross*, the insurer originally denied the claim in reliance upon the opinion of a registered nurse. The Court held that this was just fine. Here, however, Bankers Life retains a physician, one of substantial credentials in the field of vascular diseases and relies upon the medical opinion of that physician. Bankers Life we convict of bad faith. This is irrational.

I have read pages 39-43 repeatedly searching for a suggestion, first, that Dr. McParland should never have been allowed to testify or, second, that after he testified his testimony should have been excluded or, ultimately, that Dr. McParland's testimony was so incredible that notwithstanding same Crenshaw was entitled to a peremptory instruction in his favor on the underlying contract claim. None of these suggestions are made. Absent such, the majority opinion discredits itself.

The majority's opinion treats as somehow significant that McParland was a paid part-time employee of Bankers Life, deriving approximately twenty pcent of his income from services rendered to Bankers Life. This was and is a ligitimate topic for cross-examination, for it amy be said to go to the witness' credibility. How the point is relevant on this appeal, however, escapes me. Suppose Dr. McParland had been situated the same but only ten percent of his income came from Bankers Life? Only five percent of his income? Only one percent of this income? Would we still find such evil in this arrangement?

Suppose on the other hand that Dr. McParland were not a salaried employee but rather functioned according to the classical arrangement labeled independent contractor? The majority seems to imply that this would make a difference. But suppose that Dr. McParland's work as an independent contractor in fact resulted in twenty percent *or more* of his income being derived from services renedered to Bankers Life. It is with our judicial knowledge that many physicians perform medical services for various business, commercial and industrial concerns on an independent contract basis. These physicians frequently are called to testify in a variety of types of proceedings. I have never heard of anyone suggesting that this Court should castigate the credibility of such a witness because of his relationship to the defendant company.

And I might add that it is within our knowledge that there are a number of physicians who testify regularly on behalf of injured persons who are plaintiffs in civil actions or claimants in workers' compensation proceedings. This too is and has always been recognized as a legitimate subject for cross-examination. Still I have never heard of a court castigating the credibility of any such plaintiff's physician. What the majority is doing in pages 39-43 is unprecedented in our jurisprudence. The undisguised advocacy there found and the absence of any citation to law or logic supporting such an approach to a party's expert witness should be sufficient to establish the error of the majority's approach.

F. Reliance Upon A Credible Medical Opinion Obtained In Good Faith As A Matter Of Law Furnishes An Insurer An Arguable Reason For Denial Of A Claim

Remembering that our core question is whether Bankers Life had an arguable reason for refusal to pay Crenshaw's claim, the majority's dispatch of Bankers Life's reliance upon Dr. McParland's opinion is further troublesome. I would have thought it a relatively uncontroversial proposition that, where the outcome determinative question is medical in nature, an insurer's reliance upon a physician's opinion would as a matter of law furnish an arguable reason for denial of a claim. I would have thought this particularly so against the backdrop of our decisions in *Blue Cross and Blue Shield of Mississippi, Inc. v. Campbell,* 466 So.2d 833 (Miss.1984) and *Consolidated American Life Insurance Co. v. Toche,* 410 So.2d 1303 (Miss.1982).

In *Blue Cross* we held as a matter of law that an insurer had an arguable reason for refusal to pay a hospitalization claim where the insurer relied on the opinion of a registered nurse. In *Consolidated American* it does not appear that the claims adjuster who rejected the claim relied on an expert medical opinion at all, in the context of which Justice Bowling in dissent chides the company for its fail-

ure to consult or seek an opinion of its full time medical director. 410 So.2d at 1307. Here Bankers Life consulted its medical director and relied upon his opinion. This generally ought to be enough.

Peel v. American Fidelity assurance Co., 680 F.2d 374 (5th Cir.1982) is quite important here. On analogous facts and applying Mississippi law, the Court of Appeals concluded

> that the findings and report of Dr. Attix [a physician retained by the insurer] that Mrs. Peel was not disabled to return to . . . [work] constitute ar arguable defense *as a matter of law.* Hence, the trial court *correctly refused to submit the issue of punitive damages to the jury.*

680 F.2d at 376. [emphasis added]

The *Peel* case is cited prominantly in Bankers Life's brief. The rule of law found in *Peel*—which is the Fifth Circuit's *Erie*-bound[11] articulation of Mississippi law—strongly supports Bankers Life's position on this appeal. Inexplicably *Peel* is not mentioned by the majority (although the majority shows great affection for other Fifth Circuit bad faith refusal cases applying Mississippi law).

In this state and elsewhere the law is and ought o be that reliance upon the opinion of a qualified expert physician or surgeon should as a matter of law furnish an insurer an arguable reason for refusal to pay a claim.[12] To be sure there must be limits on such a rule, *see Younan v. Equifax, Inc.*, 111 Cal.App.2d 498, 169 Cal.Rptr. 478, 487 (1980); *Little v. Stuyvesant Life Insurance Co.*, 67 Cal.App.2d 451, 136 Cal.Rptr.653, 659 (1977). Unless the Court holds that the medical expert was not qualified to

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[11] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1936).

[12] The majority seems to accept this proposition at page 38 and then inexplicably refuses to adhere to it.

give the opinion, or that his opinion was inadmissible because fraudulently rendered, the rule should hold. *See Georgia Farm Bureau Mutual Insurance Company v. Troupe,* 154 Ga.App. 108, 267 S.E.2d 834, 836 (1980); *Hermitage Health and Accident Insurance Co. v. Baggs,* 115 Ga.App. 138, 154 S.E.2d 270, 273 (1967).

In the case at bar Bankers Life sought the opinion of a physician highly qualified in the field of vascular diseases and surgery. That opinion was that the *sole* cause of the amputation of Lloyd Crenshaw's right leg was its preexisting arteriosclerotic condition. Bankers Life relied on this opinion. With respect, there is no dispassionate basis upon which one might say this was anything other than a bona fide opinion entitled to credit. In my view such a medical opinion as a matter of law furnished Bankers Life an arguable reason for refusal to pay Crenshaw's claim. To do otherwise requires that we set ourselves up as medical experts (which is precisely what the majority ultimately does). The potential for mischief in such an approach is to my mind great and obvious.

G. Bankers Life Never Relied On An Unenforceable Policy Provision Provision As A Basis For Its Denial Of Crenshaw's Claim

An additional red herring needs to be dispatched. The majority claims that the basis for Bankers Life's denial of Crenshaw's claim was its alleged literal reading of a clause in the policy we held in *Peerless Insurance Co. v. Myers,* 192 So.2d 437 (Miss.1966) unenforceable literally. This language is in the form of a policy definition of the term "injury" as meaning

> bodily injury causing the loss . . . directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person.

In *Peerless* we held that, notwithstanding such a clause,

> recovery may be had where the accidental injury aggravates, renders active, or sets in motion a latent or dormant pre-existing physical condition or disease, which in turn contributes to the disability or death for which recovery is sought . . . .

192 So.2d at 439.

True, Bankers Life quoted the language of the clause in its claim denial letters of July 11, 1979, and April 8, 1980. Those letters coupled with the August 18, 1980 letter to Crenshaw's attorney make clear that Bankers Life is relying ultimately upon the medical opinion of Dr. McParland that the *sole* cause of the amputation was the preexisting arteriosclerosis. The majority obfuscates this feature of the claim denial letters and insists (at page 31 and elsewhere) that Bankers Life was relying on the *Peerless*-invalidated definition of injury. I cannot find these facts in any of Bankers Life's claim denial letters or anywhere else in the record.

Having misfound the facts, the majority proceeds to find false comfort in the Fifth Circuit's decision in *Richards v. Allstate Insurance Company*, 693 F.2d 502 (5th Cir.1982). In *Richards*, Allstate denied a claim on the basis of a policy exclusion which this Court had previously held unenforceable in *Lowery v. State Farm Mutual Automobile Insurance Co.*, 285 So.2d 767 (Miss.1973). Rashly, the majority says "This case is really worse than *Allstate*" (p.32). With respect, I would suggest that examination of the *Richards* case and this case and a careful comparison of the two reveals the majority's analogy to be so much wishful thinking.

The basis for the superficial similarity between this case and *Allstate* is that Bankers Life refers in its denial letters to a definition of injury we held unenforceable in *Peerless*. What the majority overlooks is that the denial of this claim, both pre-trial and at trial, was not based on the unenforceable policy provision but was in fact made on

the premise that the *sole* cause of the amputation was the preexisting arteriosclerotic condition in Crenshaw's right leg. I have been able to find nothing in the record to indicate that Bankers Life accepted the proposition that Crenshaw had sustained a trauma which aggravated preexisting arteriosclerotic condition and then, ignoring *Peerless*, denied the claim by the literal invoking of the policy language.

Even if it may be said that Bankers Life ignored *Peerless* in the same sense that Allstate ignored *Lowery v. State Farm*, we have here a wholly independent basis for the denial of the claim—Dr. McParland's opinion that there was no cause of the amputation other than the preexisting arteriosclerotic changes. In *Richards v. Allstate* there was no other basis for denial of the claim other than the exclusionary clause invalidated in *Lowery v. State Farm*.

III. The Blue Cross Misconnection

The majority's treatment of our recent decision in *Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss.1984) is troublesome on several fronts, one of which has been mentioned. The majority's primary reference to *Blue Cross* regards the matter of who decides whether "an arguable reason" exists, 466 So.2d at 842, the problem with which is that the premise stated refers neither to what the trial judge did in this case, nor what he should have done, and simply plays no discernable role in the overall structure of the majority opinion and its view of how bad faith refusal cases should be handled. Conversely, the majority completely ignores the principal passage from *Blue Cross* I would have thought relevant here—that ordinarily, where the insurer has a reason for denying a claim sufficient that it survives the plaintiff insured's motion for a directed verdict or peremptory instruction on the liability feature of the underlying contract claim, the insurer should thereupon become insulated from an award of punitive damages. *Blue Cross*, 466 So.2d at

842-43. Because of their importance, I will discuss these two points with some care.

A. Whether An Insurer Has An Arguable Reason For Failure To Pay With Reasonable Promptness Is A Question Of Ultimate Fact Determined By The Jury And Subject To The Rule Of Paymaster Oil–Although No Issue Here Turns On The Point

In *Blue Cross* the majority states

> When the presentation of all evidence has been completed by both sides, it is the function and responsibility of the trial court to determine whether the insurance carrier has a reasonably arguable basis, either in fact or in law, to deny the claim.

466 So.2d at 842.

This proposition is repeated at page 28 of the majority opinion in the case at bar.[13] Such repetition adds only to the authority of the proposition, not its logic.

Whether an insurer has an arguable reason for refusal to pay a claim is inherently and predominantly a question of fact. The question is a matter of consequence on that day and in that case. It involves an inquiry which by and large will be of no concern or interest outside the context of the particular action. It is a "why did you act or fail to act" inquiry directed to one of the parties. It is even a question of fact when the insurer asserts a purely "legal"

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[13] The notion at issue may have been derived from Freeland, et fil., *BAd Faith Litigation: A Practical Analysis*, 53 Miss.L.J. 237, 262-70 (1983). In my view, whether an insurer has an arguable reason for its refusal to pay a claim with reasonable promptness is no more a question for the trial judge—as distinguished from the jury—than whether a particular course of conduct constitutes negligence. Both arguable reason and negligence inquiries involved questions of ultimate fact. Stated otherwise, each involves a mixed question of law and fact. Neither may be taken from the jury except with scrupulous regard for the strictures of *Paymaster Oil* and progeny.

defense, for whether that legal defense is valid is subject to dispute and trial the same as any other fact question. *See Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 854-55 (Miss.1984)(Robertson, J., Concurring). I had thought this approach incorporated into our law by virtue of *State Farm Fire & Casualty Co. v. Simpson*, ___So.2d ___, ___(Miss.No. 54,606, decided August 14, 1985), the ink with respect to which is not even dry.

All pure questions of fact and all questions having substantial factual components triable by a jury at common law may of right be subject to jury determinations in civil actions in this state. *See City of Jackson v. Locklear*, 431 So.2d 475, 478 (Miss.1983), construing Miss.Const. Art. 3, §31 (1890). The *raison d'etre* of *Paymaster Oil* and progeny is to assure that the constitutional right to trial by jury remains secure.

Seen in this light it is the constitutional right of each litigant, if he so elects, to have a *jury*, not the trial judge, determine whether the insurance carrier has an arguable reason for refusal to pay a claim, an inquiry which will always be essentially one of fact even where the dispute is whether a legal defense may be recognized. The trial judge's authority in such matters is severely restricted and constitutionally so. Those limitations have been repeatedly articulated in *Paymaster Oil* and progeny, the most recent of which is *State Farm Fire & Casualty Co. v. Simpson, supra*, where we cited *Paymaster Oil* and held that

> the question, whether an insurer has an arguable reason to deny the claim is to be passed upon. . . . under the same rules as are applicable in any other jury trial.

___So.2d at ___.

The correct statement of the constitutionally mandated rule is that it is the primary function and responsibility of the jury, not the trial judge, to determine whether the

insurance carrier has an arguable reason for refusal to pay a claim. The *Blue Cross* statement quoted here by the majority is thus seen wrong as matter of elementary legal reasoning. In the context of this case, this is just the beginning of the statement's inadequacies.

The record in the case at bar reflects that the trial judge *did not* "determine whether the insurance carrier has a reasonably arguable basis, either in fact or in law, to deny the claim" although he was requested to do so. The trial judge submitted the question to the jury.

As explained above—and respecting the teachings of *Paymaster Oil*—it is my view that the evidence is without contradiction that Bankers Life had an arguable reason for denial of the Crenshaw claim, and, that there was otherwise no jury issue on punitive damages. Assuming arguendo that I be wrong on the point, the arguable reason issue goes to the jury not the trial judge for decision. This is the rule the trial judge followed here, and I do not perceive the majority to reverse, thought fervently I would wish it to do so on other grounds.

I would submit that here and elsewhere I have demonstrated that determining the arguable reason issue (except with strict fidelity to *Paymaster Oil*) is not something trial judges do or ought to do in bad faith refusal cases. In the case at bar, the trial judge did not determine the arguable reason issue. The majority opinion certainly doesn't reverse him for his refusal to do so. All of this gives me hope that the majority's fascination with this rationally unsound, legally invalid and practicably unused approach to determining the fact question of whether the insurer has an arguable reason for denial of a claim will soon pass.

E. Faithful Application of *Blue Cross* Requires Reversal Here Or At Least A Candid Explanation Why Not

The majority's second sin regarding *Blue Cross* is one of omission. It is seen in the context of the trial judge's

refusal to grant Crenshaw's request for a peremptory instruction on the liability feature of the underlying contract claim made at the close of all of the evidence. The effect of this ruling was a determination by the trial judge that reasonable minds could differ on the question of whether Crenshaw's pre-existing arteriosclerosis was the sole cause of the amputation of his leg.

In *Blue Cross* this Court said:

> It can be argued with considerable persuasion that unless the trial judge grants a directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance carrier has shown reasonably arguable basis to deny the claim; and, therefore, the carrier should never be subjected to the possibility of punitive damages based upon "bad faith."
>
> There is compelling logic behind this argument and this would certainly appear to be true in the vast majority of cases. This criterion should ordinarily determine the answer to the question.

466 So.2d at 843.

We have applied this approach in *State Farm Fire & Casualty Co. v. Simpson*, ___So.2d ___, ___(Miss.1985) to reverse a substantial punitive damages judgment against an insurer. This view, which I regard as sound and which (until today) I had thought firmly imbedded in our law, has great relevance here, for on this view, when the trial judge (correctly) refused the peremptory instruction in Crenshaw's favor on the liability phase of his contract claim, he necessarily pretermitted Crenshaw's claim for punitive damages.

To be sure, this approach does not fit every case, as I have explained elsewhere.[14] But when the *Blue Cross*

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[14] *Blue Cross and Blue Shield of Mississippi, Inc. v. Campbell*, 466 So.2d 633, 652 (Miss.1964) (Robertson, J., Concurring).

majority states such a premise on April 10, 1985 and suggests that it will be found applicable "in the vast majority of cases", 466 So.2d at 843, and when the *Blue Cross* language is copied verbatim and given outcome determinative significance in *State Farm* on August 14, 1985, something more than silence is called for in the opinion of today's majority, particularly when this case seems so clearly one of that "vast majority" to which the *Blue Cross/State FArm* approach should apply. Yet the majority opinion here, however, doesn't even mention what I take to be one of the central premises of the *Blue Cross* majority opinion and the *State Farm* unanimous opinion.

Generally speaking, if the insurer has at trial denied liability on the policy—asserted lack of coverage, an affirmative defense, or whatever—and if the state of the evidence after all parties have rested is such that under our familiar rules the factual issue may not be taken from the jury, *see, e.g., Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652, 657 (Miss.1975), then the plaintiff insured is not entitled to a peremptory instruction on the underlying policy claim and as a matter of law the insurance company becomes insulated from a bad faith refusal claim.

If the evidence, to-wit: a conflict in medical opinions regarding the cause of the amputation, is such that a reasonable *jury* could find facts which would undergird a successful policy defense, the same evidence surely would justify a reasonable *insurance company* in so concluding, excepting only those cases where these is also a jury issue whether the medical opinion is a sham or the product of fraud or "lying" (at exception not present here). *Standard Life Insurance Co. of Indiana v. Veal*, 354 So.2d 239 (Miss.1977), holds that:

> If an insurance company has a legitimate reason or an arguable reason for failing to pay a claim, punitive damages will not lie, . . .

354 So.2d at 248.

An arguable reason is one in support of which there is some credible evidence. There may well be evidence to the contrary. A person is said to have an arguable reason for acting if there is some credible evidence that supports the conclusions on the basis of which he acts. And when we say this, we are in essence articulating in an extra-judicial context our familiar rules regarding what proof is necessary to create a jury question. *See, e.g., Stubblefield v. Jesee, Inc.*, 464 So.2d 47, 54 (Miss.1984); *City of Jackson v. Locklear*, 431 So.2d 457, 478 (Miss.1983); *Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652, 657 (Miss.1975).

If there is a jury issue on the underlying policy question, that is, if the plaintiff insured is not entitled to a peremptory instruction on the liability feature of his underlying policy claim, then it follows generally that the insurance company has an arguable reason for failing to pay the claim.[15] This is the central teaching of *Blue Cross*, 466 So.2d at 843.

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[15] Courts in other jurisdictions have recognized that where there is a factual issue on the liability feature of the insured's policy claim, an award of punitive damages or a statutory penalty is not proper as a matter of law. The Supreme Court of Iowa discussed this point as follows:

> The evidence adduced by defendants in support of their defense of misrepresentation clearly made plaintiff's contract claim 'fairly debatable,' and trial court must have determined this was so when it denied plaintiff's motion for a directed verdict on that claim. *Plaintiff thus failed as a matter of law to prove what the adopting jurisdictions consider as essential element of the first-party bad faith tort, i.e., the absence of a reasonable basis for denying contract benefits.* Accordingly, the jury should not have been instructed on that tort, and plaintiff's claim for punitive damages should not

This approach is undergirded by and traceable to *Veal* where we stated

> in our view of the case the plaintiff was entitled to a peremptory instruction directing the jury to find for him for the face amount of the policy, 354 So.2d at 246,

and only then affirmed an award of punitive damages. This is what I read *Blue Cross* as accepting as the approach to be applied "in the vast majority of cases", 466 So.2d at 843.

Without doubt the above formulation will not work in every case. Where the insurer's representatives lie or their defense is otherwise fraudulently conceived, the denial of the insured's request for a peremptory instruction on the liability claim should not preclude submission to the jury of the bad faith refusal claim. *Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d E33, 852

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have been submitted to the jury.

Higgins v. Blue Cross, 319 N.W.2d 232, 236 (1982)(emphasis added). In *Gulf Life Ins. Co. v. Wilson*, 181 S.E.2d 914 (Ga.1971), the Courts said:

> Since there was a jury issue as to whether Mr. Wilson was mentally competent to execute the release, and a verdict was authorized for either plaintiff or defendant on that issue, it cannot be said that the defense of Gulf Life was frivolous or unfounded, that it did not have a reasonable ground for contesting the claim. No bad faith appears in making the defense, and the award of penalty and attorney's fees was unauthorized. . . . *If the evidence authorized a verdict for the defendant, or to put it another way, if the verdict could have gone for either party it does not authorize a finding of bad faith.* 18 S.E.2d at 916-17. (emphasis added, citations omitted).

See also National Savings Life Insurance Company v. Dutton, 419 So.2d 1357, 1362 (Ala.1982); *Welch v. Western Cas. & Sur. Co.*, 567 S.W.2d 743, 748 (Mo.1976) and my concurring opinions in *Reserve Life Insurance Company v. McGee*, 444 So.2d 803, 814-19 (Miss.1983) and *BlueCross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 851-52 (Miss.1985).

(Miss.1984)(Robertson, J., concurring). It may be that the majority here regards Bankers Life's defense as a lie or otherwise the product of fraud, and if it does I wish it would forthrightly so state, for in that event only this case would be wrong. As the opinion now stands, and when it is compared with the portion of *Blue Cross*and *State Farm* here under discussion, the whole fabric of our law of bad faith refusal cases is seen rent with confusion and inconsistency.

For the reasons already explained, when this central thrust of *Blue Cross* and *State Farm* is applied to the case at bar, the judgment for punitive damages against Bankers Life can only be reversed and rendered. When the majority here doesn't even try to distinguish *Blue Cross* or *State Farm* or show how this case fits within some exception to the rule of those cases, but merely proceeds as though this central premise did not exist in our law, the injustice of our affirmance of the $1,600,000.00 punitive damages judgment becomes even more apparent.

IV. The Majority Affirms An Assessment Of Punitive Damages In This Bad Faith Refusal Case By Reference To A Standard Without Precedent In This State And Different From And Lesser Than The Standard Applicable In All Other Punitive Damages Cases

My final complaint is that the majority en route to affirmance has wholly departed from our general substantive rules regarding the assessment of punitive damages. Indeed, the majority has carved out bad faith refusal cases and held that in such cases punitive damages may be assessed upon a lesser showing than we require generally. I would hold that the substantive rule breach of which may subject a party to an assessment of punitive damages is the same in bad faith refusal cases as in any others.

The majority opinion, at pages 28-33 and particularly on page 33, appears to hold that punitive damages may be

assessed solely upon a showing that the insurer denied the claim without an arguable reason therfore. All of our bad faith refusal cases—from *Standard Live v. Veal* forward—until today proceeded under the premise that punitive damages could not be assessed against an insurer unless there had been a violation of our general rule that proof of gross, reckless or maliciously intentional conduct must be shown. I read the majority as suggesting that denying a claim or defending a lawsuit without an arguable basis therefor will without more subject one to punitive damages.[16]

The confusion on this point—of which the majority here is by no means the first manifestation—appears to emanate from that most overworked sentence from *Standard Life v. Veal*, which in pertinent part reads:

> Of course, if an insurance company has . . . an arguable reason for failing to pay a claim, punitive damages will not lie, ...

354 So.2d at 248.
This statement makes sense and has appropriately become the bedrock of much of our law in bad faith refusal cases.

The problem is that *the converse is not necessarily so.* That the *presence* of an arguable reason precludes assessment of punitive damages does not mean that the absence of an arguable reason requires their award. Yet this is precisely the trap into which the majority here—and no doubt others—have fallen, for the majority seems to proceed on the notion that all Crenshaw had to show to recover punitive damages was the *absence* of an arguable reason for Bankers Life's denial of his claim (see particularly page 33 of majority opinion).

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[16] If this is the rule, a lot of litigants and their lawyers are in big trouble. And what about the converse? If a plaintiff presses a claim without an arguable basis for believing it viable, is the plaintiff subject to an assessment of punitive damages?

I submit that more than the absence of an arguable reason must be shown before punitive damages are recoverable, much more, and that none of our cases prior to today holds to the contrary. The three bad faith refusal cases in which we have heretofore affirmed assessments of punitive damages all proceed under our general rule regarding punitive damages, that such damages are assessable only where the insurer has been guilty of some willful or malicious wrong or the gross or reckless disregard for the rights of others. *Standard Life Insurance Company of Indiana v. Veal*, 354 So.2d at 247; *Travelers Indemnity Co. v. Wetherbee*, 368 So.2d 829, 835 (Miss.1979), and *Reserve Life Insurance Company v. McGee*, 444 So.2d 803, 808-09 (Miss.1983). Where one or more of these labels may fairly be said to describe the conduct of the insurer, no doubt that insurer will have denied the claim without an arguable reason, but *again the converse is not necessarily so.*

The point is driven home by a recognition of the various circumstances in which, objectively speaking, an insurer may have no arguable reason for refusal to pay a claim but may nevertheless not be lawfully subject to an assessment of punitive damages. Where the failure to pay the claim is the result of a "clerical error or honest mistake", *State Farm Fire & Casualty Co. v. Simpson, supra; Consolidated American Life Insurance Co. v. Toche*, 410 So.2d 1303, 1306 (Miss.1982), punitive damages do not lie though objectively speaking the insurer has no arguable reason for failure to honor a just claim. A failure to pay may result from negligence on the part of the insurer and punitive damages are not assessable, again assuming arguendo the objective absence of an arguable reason for such failure to pay. *State Farm Fire & Casualty Co. v. Simpson, supra; Bellefonte Insurance Co. v. Griffith*, 358 So.2d 387, 391 (Miss.1978). I doubt we would uphold an assessment of punitive damages where the insurer acted upon the erroneous advice of counsel, see Freeland, et fil.,

Bad Faith Litigation: A Practical Analysis, 53 Miss.L.J. 237, 250-56 (1983), again though the trier of fact has determined as a matter of fact that the insurer had no arguable reason for denial of the claim. We have only recently recognized that not every case of fraud is a case for punitive damages. *Gardner v. Jones*, 464 So.2d 1144, 1148 (Miss.1985).

We have many cases arising in a variety of factual settings where we have purported to state the rule violation of which will subject one to assessment of punitive damages. *See, e.g., Gardner v. Jones*, 464 So.2d 1144, 1148-49 (Miss.1985); *Snowden v. Osborne*, 269 So.2d 858, 860-61 (Miss.1972); *T.G. Blackwell Co. v. Eshee*, 261 So.2d 481, 485 (Miss.1972); *Seals v. St. Regis Paper Co.*, 236 So.2d 388, 392 (Miss.1970). These opinions are not remarkable for precision in thought or clarity in expression, although I doubt the rule could or should be stated in other than general terms. Out of our cases, nevertheless, there appears two somewhat distinct types of situations where one's conduct may subject him to punitive damages: where the defendant acted with malice and where the defendant acted with gross or reckless disregard for the rights of others. In this setting I would hope that some day soon we would embrace the rule found in Restatement (Second) of Torts §908(2)(1976) to the effect that

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.

I would hope further that this rule would be applied in all punitive damages cases, including bad faith refusal cases. At the very least I hope that at some future date we will return to the view that the rule for assessment of punitive damages is the *same* in bad faith refusal cases as in all others.

V. I Would Affirm Crenshaw's Judgment For $20,000.000 Contract Damages And Add To That Prejudgment Interest, Reasonable Attorneys Fees and Legal Expenses

In the final analysis, I would reverse and render so much of the judgment below as assesses punitive damages against Bankers Life. Dr. McParland from the outset and at trial advised the company that the sole cause of the amputation was Crenshaw's pre-existing arteriosclerosis. Whatever else may be said of that opinion, it furnished Bankers Life with an arguable reason for its refusal to pay. Dr. Westphal, Crenshaw's doctor, conceded that Dr. McParland's opinion could be correct, although he (Dr. Westphal) did not think it was. With respect, I suggest there is no rational basis on which it may be said that Dr. McParland was lying or that his opinion was bogus, contrived, formulated in bad faith. It follows as a matter of law that, when the arguable reason question is viewed under *Paymaster Oil* rule, Bankers Life is entitled to judgment on Crenshaw's claim for punitive damages notwithstanding the verdict of the jury. Failure to prove that element of the bad faith claim causes the entire claim to fall. On this appeal we should reverse and render on the punitive damages issue.

On the other hand, I would affirm the judgment insofar as it awards $20,000.00 in policy benefits to Crenshaw and I would add that pre-judgment interest and attorneys fees and legal expenses. I will explain.

As a part of the positive law of this state, I would have the Court declare that in any action brought by an insured against an insurance company in which the trial court enters judgment in favor of the insured and against the insurer for benefits afforded by a policy of insurance, the judgment shall have added to it

(a) pre-judgment interests at the legal rate beginning 30 days after the insured gave notice of his or her claim

(b) a reasonable attorney's fee not to exceed 25% of the amount of policy benefits recovered

(c) all legal expenses reasonably and necessarily incurred by the insured in the prosecution of the claim.

B. Reasonable And Necessary Attorneys Fees

On the award of attorneys fees, contrary to loose talk in some cases, this Court has long recognized the propriety of awarding attorneys fees *absent statutory authorization.* In the past we have approved awards of attorneys fees when the evidence was such that assessment of punitive damages was allowable, although no statute authorized such. *See, e.g., Aetna Casualty and Surety Co. v. Steele,* 373 So.2d 797, 801 (Miss.1979); *Kalmia Realty & Insurance Co. v. Hopkins,* 163 Miss. 556, 566, 141 So. 903, 904 (1932); *Yazoo & Mississippi Valley Railroad Co. v. Consumers' Ice & Power Co.,* 109 Miss. 43, 48, 67 So.657, 658 (1915). This proposal would merely render less stringent the proof required of the plaintiff insured before attorneys fees could be recovered.

Shifting the burden of attorneys fees and legal expenses to the party adjudged at fault is a growing practice in litigation arising out of commercial or business transactions. The law requiring this emanates from two principal sources: statutory enactments[17] of the legislature and privately made law embodied in agreements between the parties.

In recent years the Mississippi Legislature has enacted a number of statutes authorizing recovery of legal fees and expenses in a business or commercial context. *See, e.g.,* Miss. Code Ann. §11-31-2(3)(c) (Supp.1984) (attorneys

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[17] Because they are enactments of that branch of government most clearly charged with discerning and implementing the public policy of the state, statutes are an important though often neglected source of law. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases,* 50 Geo.W.L.Rev. 554 (1982).

fees recoverable against party who brings attachment in bad faith); §11-53-81 (attorneys fees recoverable in suit on an open account); §75-9-504(1)(a) (1972) (attorneys fees recoverable by secured party disposing of collateral after default); §75-9-506(1972)(attorneys fees must be paid to secured party if debtor redeems collateral); §75-24-15(2) (Supp.1984) (attorneys fees recoverable against violator of Consumer Protection chapter)§75-71-717 (Supp.1984)(attorneys fees recoverable by party who purchased illegal or fraudulent security); §83-21-51(1972) (attorneys fees recovered against foreign insurance company for bad faith).

The overwhelming majority of privately made arrangements—contracts, leases, promissory notes, deeds of trust, security agreements, and the like—provide that the party guilty of breach shall be liable to the other for reasonable attorneys fees and legal expenses. We routinely enforce such agreements. *See, e.g., Vinson v. McCarthy*, 413 So.2d 1026, 1032 (Miss.1982) (attorneys fees clause in promissory note); *Huey v. Port Gibson Bank*, 390 So.2d 1005, 1007 (Miss.1980) (same); *O. J. Stanton & Co. v. Dennis*, 360 So.2d 669, 672 (Miss.1978) (attorneys fee clause in performance bond). The private commercial agreement which does not call for payment of attorneys fees upon breach has become the exception, not the rule, at least numerically speaking.

Little perceptiveness is required to discern the reason for this shifting of the burden of attorneys fees. Where this has been done by statute, the lawmakers invariably faced a situation either (a) where enforcement of important substantive rights by private action was being discouraged by imposing the cost of even successful litigation on the plaintiff or (b) where imposition of the reasonable costs (otherwise non-recoverable costs such as attorneys fees and legal expenses) upon a successful plaintiff would so substantially reduce a successful plaintiff's net recovery as to yield an apparent injustice, this particularly where the rel-

ative capacities to bear the burden of the expense of the litigation is generally so unequal.

Beyond this, it is within our actual and judicial knowledge that, where clauses providing that an unsuccessful defendant must pay reasonable attorneys fees and legal expenses have been made law privately by agreement of the parties, some of the same motivations may be found, principally that otherwise the cost of litigation will substantially reduce the successful plaintiff's net recovery. It should require little imagination to see that these same considerations are present when an insured such as Lloyd Crenshaw brings suit on a health and accident policy against an insurer such as Bankers Life.

In this context, the proposal made here would do nothing more than bring insurance claims litigation in line with the extant public policy of the state in business and commercial transactions, within which generic notions insurance contracts certainly lie.[18]

B. Pre-Judgment Interest

I would award pre-judgment interest on a similar approach.

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[18] My view on this point represents a conscious refinement of the suggestion I made in my concurring opinion in *Blue Cross*, 466 So.2d at 847. Because of the relative economic strength of the litigants and the obvious financial impact on the insured of having to pay his own attorneys fees and legal expenses, I would hold a rule of law that, *if* he prevails on his underlying contract claim, the insured without more becomes entitled to recover reasonable and necessary attorneys fees and legal expenses.

If he had established the two elements of the basic bad faith refusal claim, I would have allowed recovery for actual economic losses or mental anguish—for reasonably forseeable tort damages generally. *Blue Cross*, 466 So.2d at 847. The point is not present in the case at bar, first, because (in my view) Crenshaw has not proved the absence of an arguable reason—an element of the basic bad faith refusal claim, and, second, because Crenshaw made no proof of tort damages.

Crenshaw's claim for benefits was submitted to Bankers Life on April 9, 1979. It has not been paid yet thought, as we unanimously hold (and, indeed, as Bankers Life concedes), it has been authoritatively determined valid.

The insurer's duty in this regard is grounded in part in the insurance contract and in part in the positive law of the state. That duty is not merely to pay valid claims but to pay them promptly.

Little awareness of the realities of life is required to know that the failure of an insurer to pay promptly inflicts loss on the insured of at least three kinds. First, the insured has suffered a loss. He has incurred expenses which have to be paid, normally irrespective of whether or when an insurer pays. Thus the insured relatively speaking becomes strapped for cash while the insurer is processing the claim. Delayed payment may thus impose a great burden upon the insured. Prompt payment may alleviate it.

Second, the use of one's money by another has value in economic theory and in fact. In a thousand contexts in our society this use is compensated by the charging of interest, such charges being imposed variously under the authority of public and privately made law. Changes made upon the use of one's money or forbearance to collect a debt are called interest. *Mississippi Power & Light Co. v. Kustener & Co.*, 156 Miss. 22, 34, 125 So. 429, 432 (1930); *State Highway Commission v. Wunderlich*, 194 Miss. 119, 122, 11 So.2d 437, 438 (1943). The economic value of an insurer's use of an insured's money, pending investigation and processing of a claim, is real and should be compensated via interest.

Third, the real economic value of the benefits due an insured decreases if payment is delayed because of inflation. The rate of inflation may be high or it may be low but it is seldom nothing. We have recognized the impact of inflation upon citizens, and its importance, in a variety of contexts. *Adams v. Adams*, 467 So.2d 211, 215.

(Miss.1985)(child support modification); *Jesco, Inc. v. Shannon*, 451 So.2d 694, 705 (Miss.1984)(impact on damage award in personal injury case); *First National Bank of Vicksburg v. Caruthers*, 443 So.2d 862, 863 (Miss.1983)(factor justifying enforceability of due on sales clause); *Walters v. Inexco Oil Co.*, 440 So.2d 268, 275 (Miss.1983)(impact of delay incident to appeal); *Tedford v. Dempsey*, 437 So.2d 410, 418 (Miss.1983)(support agreement incident to irreconcilable differences divorce); *Mississippi Public Service Commission v. Mississippi Power Co.*, 429 So.2d 883, 890 (Miss.1983)(utility rate increase); *Kennard v. Martin*, 223 So.2d 300, 302 (Miss.1969).

In this context I would have this Court hold that, as a matter of law, prejudgment interest is payable on all insurance contracts, recognizing that even so the insured's loses as a result of delay in payment may only partially be compensated and that the insurer's temptation to delay in order to enjoy the value of the use of their collective insureds' money may only partially be deterred.

Although our cases have been restrictive, we have heretofore recognized the propriety of an award of prejudgment interest *in the absence of statute* where the evidence is sufficient to justify an award of punitive damages. *Stanton & Associates, Inc. v. Bryant Construction Company, Inc.*, 464 So.2d 499, 502 (Miss.1985); *Dunnam v. State Farm Mutual Automobile Insurance Co.*, 366 So.2d 668, 672 (Miss.1979), and in cases where the amount due is liquidated when the claim is originally made, *Home Insurance Company v. Olmstead*, 355 So.2d 310, 314 (Miss.1978). I would hold that the circumstances discussed above regarding the losses suffered by the insured through delay in claims holding, and relative abilities to shoulder these losses of insurer versus insured coupled with the relative bargaining power of insurer versus insured requires that we recognize a lowered threshhold showing before prejudgment interest may be allowed.

We note that there has been in our sister states in recent years an increased recognition of the importance of awarding prejudgment interest in order to assure that the value of a plaintiff's recovery is not unfairly diluted. *E.g., City of Portland v. Hoffman Construction Company*, 266 Or. 789, 596 F.2d 1305, 1315 (1979); *Bond v. City of Huntington*, 276 S.E.2d 539, 546-50 (W.Va.1981). This is particularly so where the claim sounds in contract and seeks compensation for damages sustained in the past. *McIntosh v. Aetna Life Insurance Company*, 268 A.2d 518, 521 (D.C.1970): Restatement (Second), Contracts §347(b)(1979).

The insurer, of course, is entitled to a reasonable period of time within which to investigate and process a claim. This is wholly consistent with the insurer's duty to pay with reasonable promptness. I would hold that prejudgment interest on all first party insurance claims should begin to run thirty days following the insurer's receipt of the proof of claim, unless the equities of a given case clearly indicate that the commencement date should be later.

D. The Judgment The Court Should Order

Applying the foregoing principles to the case at bar, Crenshaw's judgment for $20,000.00 as policy benefits should be affirmed. In addition, I would hold him entitled to interest at the legal rate of eight percent from thirty days after he filed his claim with Bankers Life. This was some time in early 1979. Crenshaw would thus be entitled to at least $9,600.00 in interest (8% of $20,000.00 = $1,600.00 interest per year). In addition, Crenshaw would be entitled to recover his reasonable and necessary attorneys fees and his reasonable and necessary legal expenses, for the determination of which I would remand to the Circuit Court.

So much of the judgment below as awards to Lloyd Crenshaw and assesses against Bankers Life for punitive

damages in any amount I would reverse and render. To the extent that the Court today departs from this view, I respectfully dissent. WALKER, P.J., AND PRATHER, J., JOIN IN THIS OPINION

APPENDIX B

MINUTES, SUPREME COURT OF MISSISSIPPI SEPTEMBER TERM, 1985

WEDNESDAY, SEPTEMBER 11, 1985, COURT SITTING : : : : :

BANKERS LIFE AND CASUALTY COMPANY
#54,123 v
LLOYD M. CRENSHAW

This cause having been submitted at a former Term of this Court on the record herein from the Circuit Court of Jackson County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the Judgment of said Circuit Court rendered in this cause on the 3rd day of December, 1981, be and the same is hereby affirmed. Judgment is in favor of Lloyd M. Crenshaw against Bankers Life and Casualty Company and the American Insurance Company, surety, in the amount of $1,620,000.00 plus interest at the rate of 8% per annum from December 3, 1981, until paid together with all costs taxed in the Lower Court and this Court adds the sum of $243,000.00 being damages at the rate of 15% as provided for by statute. It is further ordered and adjudged that the appellant do pay all of the costs of this appeal to be taxed.

APPENDIX C

MINUTES, SUPREME COURT OF MISSISSIPPI SEPTEMBER TERM 1985

WEDNESDAY, FEBRUARY 26, 1986 :

BANKERS LIFE & CASUALTY COMPANY

#54,123 v.
LLOYD M. CRENSHAW

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order that said petition be and the same is hereby denied. This cause this day also came on to be heard on Motion to Correct Judgment and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order that said motion be and the same is hereby overruled.

ATTEST
A True Copy
This 10th day of
March, 1986
Illegible line
SUPREME COURT OF MISSISSIPPI

By Illegible Signature

APPENDIX D

JURY VERDICT FOR PLAINTIFF MONEY JUDGMENT

LLOYD M. CRENSHAW
VS. NO 11,292
BANKERS LIFE AND CASUALTY COMPANY

This cause coming on for hearing on this a regular day of this term of Court, comes parties Plaintiff and Defendant in person and by their respective attorneys of record and both having announced ready for trial, and issue being joined herein;

Whereupon came a Jury composed of JAMES HAROLD SMITH and eleven other good and lawful Jurors of Jackson County, Mississippi, who having been empaneled, selected and accepted by both Plaintiff and Defendant, after hearing all of the evidence introduced, heard argument of counsel and received the instructions of the Court, retired to consider their verdict, and presently returned into open court the following verdict, to-wit:

> "We, the jury, find for the Plaintiff, Lloyd M. Crenshaw, and assess his actual damages at $20,000.00 and assess Punitive damages against Bankers Life And Caualty Company" at $1,600,000

It is accordingly the judgment of the Court and so ordered by the Court that Plaintiff Lloyd M. Crenshaw do have and recover judgement of and from Defendant Bankers Life and Casualty Company the sum of $1,620,000 together with all costs as accrued in this cause for all of which let all proper process issue.

Ordered this the 3rd day of December A.D. 1981

FILED
3rd day of December 1981
Joe W. Martin, Jr. Clerk

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 54,123

BANKERS LIFE AND CASUALTY COMPANY
APPELLANT

VS.

LLOYD M. CRENSHAW
APPELLEE

RECEIVED

OCT 11 1985

MOTION TO CORRECT JUDGMENT

COMES NOW Bankers Life and Casualty Company, pursuant to Rule 19, and moves this Court to Correct its Mandate issued in this cause so as to delete the 15% statutory penalty assessed against Bankers Life, and in support of its Motion would show the following, to-wit:

1. On September 11, 1985, this Court issued its mandate in this cause affirming the judgment against Bankers Life and Casualty Company in the amount of $20,000 actual damages and $1,600,000 punitive damages with interest thereon. The mandate also included the sum of $243,000 as a penalty for damages of 15% of the amount of judg-

ment as provided by Miss. Code Ann. § 11-3-23 (Supp. 1985) (Minute Book "BY", Page 29).

2. Bankers Life and Casualty Company submits that Miss. Code Ann. § 11-3-23 is unconstitutional on its face and in application as the statute violates the rights of equal protection and due process of Bankers Life and others similarly situated which are guaranteed by the United States and Mississippi Constitutions.

3. The statute should be struck as unconstitutional by this Court and the mandate corrected to delete the 15% penalty.

Respectfully submitted,

Charles G. Copeland
CHARLES G. COPELAND
J. TUCKER MITCHELL
Post Office Drawer 2132
Jackson, Mississippi 39225-2132

JOHN M. KINARD
MICHAEL J. MCELHANEY
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OF COUNSEL:

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Post Office Box 787

Pascagoula, Mississippi 39567

Phone: (601) 762-2271

CERTIFICATION

I, CHARLES G. COPELAND, do hereby certify that I have personally read a copy of the judgment and mandate and that the relief sought by Appellant is not already contained in the judgment.

THIS, the 11th day of October, 1985.

/s/Charles G. Copeland
CHARLES G. COPELAND

CERTIFICATE OF SERVICE

I, CHARLES G. COPELAND, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellant's Motion to Correct Mandate to ERNEST R. SCHROEDER, ESQ., BRYAN, NELSON, ALLEN, SCHROEDER AND BACKSTROM, 1103 Jackson Avenue, Post Office Drawer 1529, Pascagoula, Mississippi 39567, Attorney for Appellee.

THIS, the 11th day of October, 1985.

/s/Charles G. Copeland
CHARLES G. COPELAND

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY COMPANY
APPELLANT

VS.

LLOYD M. CRENSHAW
APPELLEE

APPELLANT'S BRIEF IN SUPPORT OF MOTION TO CORRECT JUDGMENT

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ATTORNEYS FOR APPELLANT, BANKERS
LIFE AND CASUALTY COMPANY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY COMPANY
APPELLANT

VS.

LLOYD M. CRENSHAW
APPELLEE

APPELLANT'S BRIEF IN SUPPORT OF MOTION TO CORRECT JUDGMENT

On September 11, 1985, this Court issued its mandate in this cause affirming the judgment against Bankers Life and Casualty Company ("Bankers Life") in the amount of $20,000 actual damages and $1,600,000 punitive damages with interest thereon at the rate of eight percent (8%) per annum from December 3, 1981. The Court also added the sum of

43,000 as a penalty or damages of 15% of the amount of judgment as provided for by Miss. Code Ann. § 11-3-23. (Minute Book "EY", Page 29).

Miss. Code Ann. § 11-3-23, which automatically applies a penalty of 15% of the original judgment as damages, is unconstitutional. The statute violates the rights of equal protection and due process guaranteed by the United States and Mississippi Constitutions. It imposes a barrier to appeal to the Mississippi Supreme Court that is not reasonably related to any legitimate or articulated statutory purpose.

The statute also fails to meet due process requirements as it creates a substantial and unnecessary risk by which an appellant such as Bankers Life is wrongfully deprived of a significant property interest. The statute is not the least restrictive means of accomplishing a purpose of compensating the appellee or of deterring frivolous appeals and appeals taken for delay. The statute should be struck as unconstitutional by this Court and the mandate corrected to delete the penalty allowed.

ARGUMENT

A. MISS. CODE ANN. § 11-3-23 (SUPP. 1985)

Mississippi has imposed a mandatory penalty on parties who unsuccessfully appeal to the Mississippi Supreme Court since 1857. Miss. Rev. Code, ch. 63, art. 12 (1857) (imposing mandatory damages of 5% of the judgment if judgment was affirmed on appeal). The amount of the penalty was increased to 15% in 1980 by amendments to Miss. Code Ann. § 11-3-23 (Supp. 1985), which reads in part as follows:

> In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money the damages shall be upon such sum. . . .

Section 11-3-23 operates as a *mandatory* imposition of a fixed penalty on an unsuccessful appellant. The statute does not state any expressed legislative purpose. This Court has described the purpose of § 11-3-23 as the compensation to the successful appellee for expenses or costs incurred through the wrongful appeal by his adversary. *Canal Bank and Trust Co. v. Brewer,* 147 Miss. 85, 114 So. 127 (1927)

(applying 5% statutory penalty). Another assumed purpose of Mississippi's appeal penalty statute is the State's interest in discouraging unfounded appeals. *Tigner v. McGehee,* 60 Miss. 242 (1882).

B. EQUAL PROTECTION

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." United States Const. Amend. XIV, Section 1. The U. S. Supreme Court has held that "if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review." *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). However, if a State does afford an appeal, "it cannot be granted to some litigants and *capriciously* or *arbitrarily* denied to others without violating the Equal Protection Clause." *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). The U. S. Supreme Court in *Lindsey* also stated that a State may act "to discourage blatently insubstantial appeals . . . if [its] rules are *reasonably tailored to achieve these ends* and if they are *uniformly and nondiscriminately applied. Id.* at 78. (Emphasis added).

In *Lindsey v. Normet,* the U. S. Supreme Court struck down the Oregon Forceful Entry and Wrongful Detainer Statute which required a double bond as a prerequisite to an appeal and provided that upon affirmance of judgment the appellee collected the entire amount of the double bond. The Court emphasized that sub penalty statutes will only be upheld if "uniformly and nondiscriminately applied." The Court found the double bond was not reasonably related to a legitimate legislative purpose. Additionally, the statute discouraged meritorious as well as frivolous appeals and discriminated against lessees who could not post bond to the extent of creating a barrier to appeal. The Court stated, "for them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be." *Id.* at 79. The Supreme Court also noted that since the ap-

pellee was automatically awarded the entire amount of the bond on affirmance, the provisions operated as "an automatic assessment of unproved damages." *Id.* at 78.

If the application of § 11-3-23 discourages an appeal "capriciously or arbitrarily" to some, it violates the Equal Protection Clause. *Lindsey v. Normet.* If the statute is to be upheld as constitutional it must be rationally related to a legitimate legislative purpose and a logical connection must exist between the statutory purpose and the classification created by the statute. *United States Dep't. of Agriculture v. Moreno,* 413 U.S. 528, 533 (1973).

The Ninth Circuit Court of Appeals has recognized that the "appellee's cost of appeal" argument described in *Canal Bank & Trust Co. v. Brewer* is not legitimate. *O'Day v. George Arakelian Farms, Inc.,* 536 F.2d 856, 860 (9th Cir. 1976). In *O'Day*, the Court of Appeals applied the U. S. Supreme Court reasoning in *Lindsey* to a double bond requirement of the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499g(c). The Court, citing *Lindsey,* held that when a state does provide an appeal, the procedure cannot be arbitrarily denied to some persons and, for the double bond requirement to be upheld the provision must be reasonably tailored and uniformly and nondiscriminately applied. *Id.* at 860. The Court stated:

> As applied to the appellant in this case, the double bond requirement is not reasonably or rationally related to a legitimate governmental purpose and constitutes an effective bar to appeal. It therefore arbitrarily denies appellant and similarly situated litigants the statutory right to appeal.
>
> The stated purpose of the double bond requirement was 'to discourage frivolous appeals taken for the purpose of delaying payment and thereby tending to defeat the purpose of the act.' . . . As noted, *Lindsey* expressly held that there is no

> rational relation between this admittedly legitimate purpose and a double bond requirement.
>
> * * * * *
>
> *Lindsey* also makes clear, however, that the requirement imposed must be rationally related to securing the interest involved. Legislative categories need not be drawn with 'mathematical nicety' . . ., for classification necessarily involves approximation; but legislative classifications which are not only imprecise, but lack rational relationship to their avowed purpose, are invalid. *Id.* at 859-60.

In recognizing that the appeal penalty is not related to appellee's expenses on appeal, the Court in *O'Day* stated:

> If the claim is small, the product will be wholly inadequate; if the claim is large, as in this case, it will be grossly excessive. Risk and security will coincide only fortuitously if at all. Id. at 860.

It is clear that under § 11-3-23, successful appellees receive a 15% "windfall" totally unrelated to any costs they might have incurred. Section 11-3-23 is violative of the Equal Protection Clause as it fails to relate in any manner to the amount of actual costs incurred by the appellee.

If the purpose of § 11-3-23 is considered to be prevention of frivolous appeals, it is manifestly overinclusive and unreasonably severe, and at the same time, it is irrationally underinclusive. Under § 11-3-23, Bankers Life and other defendant-appellants in similar positions are subjected to an automatic, nondiscretionary 15% penalty, payable to the plaintiff-appellee, upon affirmance of a money judgment, even where the issues are novel, complex, and open to dispute so that they divide the decision of this Court 6/3 on liability and 5/4 on damages and require consideration by the Court for over 20 months.

By imposing a 15% penalty on all parties who appeal a monetary judgment subsequently affirmed, § 11-3-23 burdens not only parties bringing frivolous appeals but also parties who appeal in good faith on a defense that, although unsuccessful, might nevertheless be meritorious. Thus, the requisite degree of relatedness between the class designated and the statute's penal or deterrent objective is not present. Under the operation of the statute, the question is not if error will occur, but how often? It is certain that unsuccessful defendant-appellants with meritorious defenses will be penalized. This overinclusiveness creates fundamental unfairness, unreasonableness and arbitrariness which is prohibited by the Constitution in providing equal protection of the laws. Thus, the section is plainly overinclusive as it discourages both frivolous and meritorious but unsuccessful appeals.

The section is also underinclusive and violates equal protection requirements as it does not apply to all classes of appellants equally. Appellants in civil actions for monetary damages may be divided into three classes: (1) Defendant-appellants against whom a monetary judgment has been awarded; (2) plaintiff-appellants for whom a monetary award has been granted and who appeal seeking a larger award; and (3) plaintiff-appellants who appeal a judgment for the defendant. Section 11-3-23 is not applicable to the third class because there is no monetary judgment on which to assess the statutory penalty. The exclusion of certain plaintiff-appellants who are unsuccessful on appeal is irreconcilable with the purpose of penalizing and deterring frivolous appeals. It is well recognized that to pass constitutional requirements differential treatment of a designated class from those outside the class must be justified by a genuine and *substantial* difference relevant to state objectives. *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). In application, the appeal penalty statute does not apply to all "appellants". This favorable treat-

ment to some plaintiff-appellants is constitutionally forbidden.

C. DUE PROCESS

Although the Due Process Clause of the Constitution does not guarantee a right to appeal, it does require "some form of hearing before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). A person has a true property interest in his money, therefore, before § 11-3-23 can deprive an unsuccessful appellant, such as Bankers Life, of its money the requirements of due process must be met. The requirements of due process are set forth in *Mathews v. Eldridge:*

> [The test] requires consideration of three distinct factors: First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

The *Mathews* test is now applicable not only to the decision of the form of hearing required, but also to other elements that effect the "fundamental fairness" of the hearing. *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1981).

Section 11-3-23 permanently deprives the unsuccessful appellant of his property in violation of the Due Process Clause. The appellant's deprivation is final, and he has no recourse through which to recover his property because the imposition of the penalty is mandatory. *See, Lassiter v. Department of Social Services.* If the imposition of the penalty were discretionary, the appellant could seek review

of the decision through appeal, however, it is not. Mississippi's statute provides no safeguards whatsoever to prevent wrongful deprivation of property. Section 11-3-23 imposes an automatic penalty without the benefit of any consideration of the amount of damage to the appellee. This is also the case with frivolity of the appeal. The statute neither allows evidence to be presented by the parties nor requires a finding by the Court that an appeal is frivolous.

Perhaps most importantly, the "good faith judgment" that the *Mathews* Court found significant is not present because the penalty is mandatory. Allowing the Court to exercise its discretion in deciding the appropriateness of penalizing the appellant, would pose only a slight administrative burden on the State. The State's pecuniary interest and any slight inconvenience is outweighed by the interest it shares with the individual in an accurate and just decision. Section 11-3-23 shows no concern for the rights of appellants and exhibits no "good faith judgment" before imposing the penalty. Thus, in addition to being unconstitutional on equal protection grounds, Mississippi's statute is unconstitutional because it denies Bankers Life its right to due process.

D. AUTHORITIES INTERPRETING MISS. CODE ANN. § 11-3-23

The constitutionality of Mississippi's appeal penalty statute was recently discussed in *Affholder, Inc. v. Southern Rock, Inc.*, 746 nF.2d 305 (5th Cir. 1984). In that case, the appellee, having prevailed on appeal in a diversity case, sought to recover 15% of his judgment. The Court held that the Mississippi 15% appeal penalty statute will no longer be applied by the Federal Court of Appeals in diversity cases arising out of Mississippi. However, the case has greater impact than curing this problem in the Federal Court system. In so holding, the Fifth Circuit Court of Appeals stated:

> The Mississippi statute is also designed to avoid frivolous appeals, but at the same time, it also penalizes those that are merely unsuccessful, even those whose appeal has such merit as to evoke a dissenting opinion. *Unlike Rule 38, the Mississippi statute makes the penalty mandatory. The mechanical application of this rule allows for no discretion, and the penalty 'must be assessed even though the justness of doing so is not apparent.' Regardless of the merits of an appeal therefore, 'the ordeal of defending an appeal is viewed by Mississippi as an injury to the appellee' and its statute, 'provides "a measure of compensation for the successful appellee, compensation for his having endured the slings and arrows of successful appellate litigation."'*
>
> * * * * *
>
> *In reaching the decision to appeal, an appellant must take into account the penalty that will be exacted if he does not succeed. It thus acts as a deterrent to exercise of the right to appeal. Id.* at 309. (Emphasis added).

In the *Affholder* case, the Court recognized that the Mississippi penalty statute creates a "chilling effect" on the appellant's constitutional rights to a trial. Specifically, it serves as a deterrent to an appeal by a defendant who has a monetary jury award entered against him. It does not apply to an unsuccessful plaintiff who receives no monetary award in the lower court and then appeals. If the defendant wins and the plaintiff appeals, there is no money judgment against which to apply the penalty even though the defendant would incur the same additional type of attorneys' fees and expenses. The statute clearly does not treat all appellants equally.

In *Wallace v. Jones,* 360 So.2d 932 (Miss. 1978), the appellant challenged the constitutionality of Mississippi's

appeal penalty statute which allowed a penalty of 5% against unsuccessful appellants. The appellant asserted that the statute violated the equal protection requirements of the Fourteenth Amendment. Justice Sugg, for the Court, held that the statute as applied does not violate the due process requirements of the Fourteenth Amendment. In so holding, the Court stated:

> If a plaintiff recovers a judgment against a defendant, appeals, and the judgment is affirmed, plaintiff is assessed 5% damages on the amount of the judgment appealed from. *Pearce v. Ford Motor Co.*, 235 So.2d 281 (Miss. 1970). The statute does not discriminate against a class of litigants because all unsuccessful appellants, whether plaintiff or defendant, are subjected to 5% damages where the judgment or decree appealed from permits recovery. *Id.* at 933.

CONCLUSION

Miss. Code Ann. § 11-3-23 is in violation of the Equal Protection Clause because it creates a barrier or "chilling effect" to appeal that is not reasonably related to any conceivable or articulated statutory purpose. The statute also fails to meet the prerequisites of due process because it creates a substantial and unnecessary risk by which Bankers Life is wrongfully deprived of its significant property interests. The statute is not the least restrictive means of accomplishing the purposes of preventing frivolous appeals and appeals for delay and compensating the appellees for expenses on appeal. Much less restrictive alternative means are reasonable and available and could be implemented to accomplish the same purposes. The statute should be struck and the mandate corrected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES G. COPELAND, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellant's Brief in Support of Motion to Correct Judgment to ERNEST R. SCHROEDER, ESQ., BRYAN, NELSON, ALLEN, SCHROEDER AND BACKSTROM, 1103 Jackson Avenue, Post Office Drawer 1529, Pascagoula, Mississippi 39567, Attorney for Appellee.

THIS, the 11th day of October, 1985.

/s/Charles G. Copeland
CHARLES G. COPELAND

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 54, 123

BANKERS LIFE AND CASUALTY COMPANY
Appellant

vs.

LLOYD M. CRENSHAW
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bankers Life and Casualty Company, the Appellant in the abovenamed, hereby appeals to the Supreme Court of the United States from:

(a) The final judgment of the Supreme Court of the State of Mississippi of September 11, 1985, affirming the judgment of the Circuit Court of Jackson County, Mississippi against Appellant entered in this action on December 3, 1981;

(b) The final order, issued by the Supreme Court of Mississippi, overruling Appellant's Petition for Rehearing and Motion to Correct Judgment, entered on February 26, 1986.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

BANKERS LIFE AND CASUALTY
COMPANY

By: /s/Charles G. Copeland
CHARLES G. COPELAND
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CERTIFICATE OF SERVICE

A true copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been mailed, postage prepaid, to the HONORABLE ERNEST R. SCHROEDER, ESQ. and the HONORABLE JOHN A. BANAHAN, ESQ., BRYAN, NELSON, ALLEN, SCHROEDER AND BACKSTROM, 1103 Jackson Avenue, Post Office Drawer 1529, Pascagoula, Mississippi 39567, Attorney for Appellee.

THIS, the 9th day of April, 1986.

/s/Charles G. Copeland

CHARLES G. COPELAND

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY COMPANY
Appellant

Versus

LLOYD M. CRENSHAW
Appellee

BRIEF OF APPELLANT

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* * * * *

B.

THE AWARD OF PUNITIVE DAMAGES WAS GROSSLY EXCESSIVE

PREFACE

A defendant in a civil action is always faced with the dilemma of whether to argue damages. An argument concerning damages often influences the trier of fact to believe the defendant has conceded liability or at least is not strongly confident in its position on liability. This dilemma is present in this appeal. BANKERS LIFE AND CASUALTY INSURANCE COMPANY AND ITS COUNSEL EMPHATICALLY BELIEVE THAT THIS IS NOT A PROPER CASE FOR PUNITIVE DAMAGES AND URGE THIS COURT TO SO FIND. Nevertheless, not having access to a crystal ball and being faced with an extremely large (and unjust) punitive damage award, Bankers Life and Casualty will discuss the size of the award. This decision is predicated upon its confidence in this Court to reject the natural instinct to discount the weight of an argument on liability when an argument on damages is made.

1. THIS COURT HAS THE POWER AND DUTY TO REDUCE EXCESSIVE PUNITIVE DAMAGES

This Court recognized its authority to review the size of a punitive damage award in *Standard Life v. Veal* where Standard raised as an issue on appeal the failure of the

trial court to reduce the amount of the $25,000.00 punitive damage award. This Court held "[i]n this case we are of the opinion that the award is not excessive." 354 So.2d at 249. In *Consolidated American v. Toche* the majority reversed the punitive damage award, however, Judge Bowling, in his dissent, indicated that in his opinion he "would affirm the punitive damage award and *direct that a remittitur be entered because of its amount.*" 410 So.2d at 1308 (emphasis added).

This Court also recognized its power to address the size of a punitive damage award in *First American National Bank v. Mitchell,* 359 So.2d 1376 (Miss. 1978).

> Although punitive damages may properly be awarded against FANB due to the fraudulent acts of its officer or agent, *$250,000 is so grossly excessive that the amount is shocking.* Not only is the record deficient and unclear as to proof of actual damages above $35,000, no proffer was made of adequate proof of the net worth or financial condition of FANB. *Snowden v. Osborne,* 269 So.2d 858 (miss. 1972). Absent some proper showing of the net worth or financial condition of FANB, *we have no way to measure the correctness of the punitive damage award ($250,000) which on its face seems totally unrealistic upon the record.* Accordingly, remand is necessary for retrial on the sole issue of damages: actual and punitive.

359 So.2d at 1381 (emphasis added).

Similarly, in *Snowden v. Osborne,* 269 So.2d 858 (Miss. 1972) an assault and battery case, this Court addressed the size of a punitive damage award[10] as follows:

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[10] This Court in *Snowden* also set out the factors to be considered by the reviewing Court: [1] *financial worth of defendant*; [2] size of the combatants, [3] knowledge of previous heart attacks, [4] malice, and

> The more difficult problem arises from the amount of the award for punitive damages. Though we have opined the instruction to be proper, we are nevertheless constrained to the opinion that there was insufficient evidence adduced to affirm a punitive award in the sum of $30,000. Tfhe record is silent as to the [1] *worth of the defendant* although it does reveal that he had prior to this suit disposed of his real property without mentioning the consideration received. It is also silent as to the [2] *physical size* of the combatants as well as their respective ages, and although these characteristics could have been and probably were observed by the jury, we have no such opportunity of observance. It is likewise silent as to whether the defendant had [3] *knowledge of the previous heart attacks* suffered by the plaintiff which [4] *could be indicative of malice* since he was found by the jury [5] *to be the aggressor.* We are, in fact, on review, left in a complete quandary by the vacuum in the record as to the *appropriateness of the judgment* by way of punitive damages other than to say *that it seems, on its face, to be* [6] *disproportionate to the physical injuries inflicted.*

269 So.2d at 861 (emphasis added).

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[5] who was the aggressor (*nature of Defendant's acts*); and [6] *relationship to actual injuries.* These factors are discussed beginning at Page 21.

Many other courts have reduced punitive damage awards which were found to be excessive.[11] A California court discussed the scope of the review in punitive damages cases and held that the appellate court *not only has the power to review but the duty:* "[w]hen the award, as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumtpion that is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act." *Rosenberg v. J. C. Penney Co.*, 30 Cal.App.2d 609, 628, 86 P.2d 696, 706 (1939) (emphasis added). The United States district judge in *Alexander v. B-W Acceptance Corp.*, 311 F. Supp. 299, 300-301 (W.D. Mo. 1969) discussed the law as follows:

> While the amount of punitive damages lies solely within the jury's discretion, it will be deemed excessive if the size of the award indicates passion, prejudice or bias or has no reasonable relation to the actual injury inflicted. This is the rule under Missouri law. See Hunter v. Kansas City Rys. Co., 213 Mo.App. 233, 248 S.W. 998. 'Generally, punitive damages must bear some relation to the injury inflicted and the cause thereof.' Beggs v. Universal C.I.T. Credit Corporation, Mo., 409 S.W.2d 719, 724.

A review of the law from this jurisdiction and other jurisdictions clearly shows that a reviewing court has the power as well as the *duty* to set aside excessive punitive damages awards. This premise is logical. In our juris-

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[11] *See e.g. Galindo v. Western States Collection Co.*, 82 N.M. 149, 477 P.2d 325 (1970) (Court held that the award of $5,000 in punitive damages was excessive and unrelated to the injury and actual damages); *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845 (Ind. 1977) (Court found that punitive damage award was "*at first blush outrageous and excessive*" and remanded for remittitur; *Gray v. Allison Division, General Motors Corp.*, 52 ___App.2d 348, 370 N.E.2d 747 (1977) (punitive damages were excessive and grossly disproportionate to the actual damages awarded).

prudence the basic purpose of an appeals court is to insure the fairness of trials in lower courts. While some actions are given a presumption of validity, any obviously erroneous result can be submitted for review upon appeal unless precluded by legislative mandate. Tfhe jury in the instant case awarded $1,600,000 in punitive damages and $20,000 in compensatory damages. The punitive damage award of $1,600,000 is *"grossly excessive that the amount is shocking"* and *"on its face seems totally unrealistic."* *First American National Bank v. Mitchell,* 259 So.2d 1376, 1381 (Miss. 1978).

2. RELATIONSHIP BETWEEN PUNITIVE AND ACTUAL DAMAGE

The general rule is that the amount of actual or compensatory damages should be taken into account when awarding punitive damages and the two awards should not be disproportionate. 25 C.J.S. *Damages* § 126(1); 22 Am. Jur. 2d *Damages* § 266. Reviewing courts, in reducing awards of punitive damages, base their decision upon several factors, none of which is more important than the amount of compensatory damages awarded. *Galindo v. Western States Collegtion Co.,* 82 N.M. 149, 477 P.2d 325 (1970), is representative of this point. In *Galindo,* a wrongful garnishment case, the court found a punitive damage award to be excessive and stated:

> The trial court awarded punitive damages of $5000.00. The rule is that the amount of punitive damages is left to the discretion of the fact finder, *'* * * but must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason and justice.* * * *'* [citation omitted].

477 P.2d at 332 (emphasis added).

The Utah Supreme Court addressed this same point in *Falkenberg v. Neff,* 269 P. 1008 (1928) and gave extensive citation for its reasoning:

> There is no definite basis upon which the amount can be computed, but *there must necessarily be a limit to the amount which may be awarded. It is the general rule that the award should not be disproportionate to the actual damage sustained, or should bear some relation to the injury complained of and the cause thereof.* 17 C.J. 995. See, also, 1 Sedgwick on Damages, § 388. In Rider v. York H. W. & P. Co., 251 Pa. 18, 95 A. 803, where $1,000 compensatory damages were awarded for injuries to land from diversion of water an award of $2,700 punitive damages was held to be excessive as *disproportionate.* In Plotnik v. Rosenberg, 55 Cal.App. 408, 203 P. 438, where the actual damages claimed was $15.60, a judgment awarding $1,500 as compensatory and exemplary damages, it was held that the exemplary damages allowed was *out of all proportion* to the actual damages and the judgment was ordered reduced on appeal to $300. In Pendleton v. Norfolk, & W. R. Co., 82 W. Va. 270, 95 S.E. 941, 16 A.L.R. 761, the verdict in an action for damages for assault and battery was for $557.50 actual and $5,000 punitive damages. On appeal, the verdict was held excessive and *disproportionate* to the actual damages, and the judgment was reversed. In the case at bar, we are forced to the conclusion that the punitive damages allowed are so excessive *and disproportionate to the actual damages sustained* that as a matter of law the verdict and judgment cannot be upheld.

269 P. at 1013 (emphasis added).

Literally hundreds of other cases indicate that courts will weigh the amount of the punitive damages against

the amount of compensatory damages.[12] In the instant case, the punitive damage award of $1,600,000 was 8000% of the $20,000 awarded as compensatory damages. Surely this escessive award cannot stand the test of the reasonable relation rule. The $1,600,000.00 award on its face alone is totally unreasonable.

3. THE AMOUNT OF PUNITIVE DAMAGES AWARDED IS EXCESSIVE IN LIGHT OF STATUTES FROM OTHER JURISDICTIONS

Many states have statutes that legislatively set the penalties for breach of insurance contracts as a percentage of the compensatory award. A portion of the Georgia statute which is representative reads as follows:

> In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that *such refusal was in bad faith,* the insurer shall be liable to pay such holder in addition to the loss, not more than *25 per cent* of the liability of the insurer for the loss and all reasonable attorney's fees for the prosecution of the case against the insurer.

GA. CODE ANN. § 56-1206. (emphasis added).

In Arkansas, the amount is 12% (ARK. STAT. ANN. § 66-3238), in Louisiana 12% (LA. REV. STAT. ANN. §

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[12] *See e.g. Stambaugh v. International Harvester*, 435 N.E.2d 729 (Ill. App. 1982). (Court reduced a $7,500,000 punitive damage judgment to $650,000 noting that the judgment was 23 times the amount of compensatory damages which were also $650,000); *Taylor v. Sandoval*, 442 F. Supp. 491 (D.Colo. 1977) (court reduced exemplary damage noting there must be a relationship between the actual damages were only $1,800); *Montgomery v. Tufford*, 437 P.2d 36 (Colo. 1968)(award of $5,500 was reversed as excessive, noting exemplary damages must bear reasonable relation to compensatory damages.)

22:658) and in Tennessee 25% (TENN. CODE ANN. § 56-3-105). The statutes vary, *but no statute* provides for *a penalty of 9,000%.*

4. RELATIONSHIP OF AMOUNT OF PUNITIVE DAMAGES TO NATURE OF DEFENDANT'S ACTS

This Court has recognized that punitive damages should be awarded only in cases of wanton, gross or intentional misconduct, *State Farm v. Roberts,* that mere negligence is not enough, *Bellefonte v. Griffin,* and that punitive damages are assessed as an example and warning to others, *Standard Life v. Veal.* The degree of reprehensibility of the actions of the defendant, if any, is an important factor to be considered by the reviewing court on appeal. *See Snowden v. Osborne,* 269 So.2d 858 (Miss. 1972) and discussion of this case at note 10, p.19. One court set out the factors to be considered as follows:

> The factors to be considered in assessing the award include [1] *the nature of the defendant's acts,* [2] *the amount of compensatory damages awarded* and [3] *the wealth of a particular* defendant. [citation omitted]. Generally, the more reprehensible the act, the greater the appropriate punishment. However, an act of considerable reprehensibility will not justify a proportionately high amount of punitive damages if the actual harm suffered thereby is small.

Walker v. Signal Companies, Inc., 84 Cal.App.3d 982, 149 Cal. Reptr. 119, 126 (1976)(emphasis added).

Bankers Life's conduct in the present case was not wanton, grossly negligent or intentional so as to warrant any award of punitive damages. Without a doubt, the company's conduct was certainly not reprehsnsible to the degree of $1,600,000. The only possible criticism of Bankers Life was that it accepted the opinion of Dr. McParlin over the opinion of Crenshaw's doctors. If this is an act for

which Bankers Life should be punished, which it emphatically disputes, then surely the nature of the act does not call for a $1,600,000 award of punitive damages, over eighty times the compensatory award. In *Travelers v. Wetherbee,* Travelers deliberately delayed the payment of an undisputed contents claim to coerce a lower settlement of a structural loss claim. The punitive damage award affirmed by this Court for this deliberate coercive act was $50,000. In *Standard Life v. Veal,* Standard Life blatently ignored the provisions of its own policy. The punitive damages award was for $25,000. What did Bankers Life do to justify a $1,600,000 punishment?

5. THE AMOUNT OF PUNITIVE DAMAGES WAS EXCESSIVE IN RELATION TO THE APPELLANT'S NET WORTH

This Court has recognized that the defendant's wealth should be considered when assessing punitive damages, *Allen v. Ritter,* 235 So.2d 253, 256 (Miss. 1970). Bankers Life's financial statement of 1980 shows that it had net assets of $294,162,474. (See line 50, "capital and surplus . . . for current year" on page 4 of Exhibit 9 found at page 762 of the Record.) In closing argument by plaintiffs' counsel the net assets were incorrectly stated to be $264,285,856. (Actually net assets the prior year). In the ten cases where this Court has addressed the issue of punitive damages for breach of insurance contracts, none of the awards for punitive damages even came remotely close to the excessive award in the instant case. Several of the insurance companies were larger in net assets than Bankers Life. For example: In *State Farm v. Roberts,* the punitive damages award was $20,000. State Farm has net assets in excess of 775 million dollars.[13] In *Aetna v Steele,* the punitive damage award was $35,000. Aetna has net assets in excess of 116 million dollars. In *Lincoln National*

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[13] All net assets are from *Annual Report of the Insurance Department of the State of Mississippi,* (March 1, 1979 to February 29, 1980).

v. Crews, the punitive damage award was $2,308.28. Lincoln National has net assets in excess of 241 million dollars. In *Travelers v. Wetherbee,* this Court upheld a $50,000 punitive damages award against Travelers, a company with net assets in excess of 960 million dollars.

In evaluating the punitive damage award against Bankers Life, this Court should take notice of both the size of other punitive damage awards in Mississippi and the relative net

> It amounted to eight days of interest income for the company. So, if you are talking about penalty—and that's what your argument was—that's not very much penalty to this company—taking away one day's income out of three hundred and sixty days—it's not very much penalty, although it's a large sum of money. So, if you look at it from the standpoint of 'are we penalizing that company?' I can't say that that's very much penalty to a company making that kind of money. *And you start talking about people paying income tax to this state and this country making Ten Thousand Dollars a year and here you have somebody making Seventy-Three Million Dollars* and *I'll bet you they have got every loophole you can think of.* Now, you justify that. I don't say it's correct or not, but that's my recollection of the testimony. But anyway, I don't have the authority to change the punitive damages.

(A.106, 107)(emphasis added)

The incredible statement, "I'll bet you they have got every loophole you can think of" puts the last nail in the coffin. To have the Circuit Judge while sitting on the Bench make an incorrect statement about nine stockholders receiving $73,000,000 profit each, when Appellee's own exhibit shows that the Company was owned by a foundation; to have him "bet" that these imaginary nine stockholders making

$73,000,000 have "every loophole"; and to have him demand that counsel "justify" the wealth and income of Bankers Life (McArthur Foundation) is a most cogent illustration of an environment in which Bankers Life had no chance whatsoever to receive a fair trial. If the Trial Judge was caught by and inflamed by the highly prejudicial argument of Crenshaw's counsel so as to openly show resentment, jealousy and prejudice against Bankers Life and its alleged stockholders due to its seemingly large financial wealth, it can be said with certainty that the lay citizens of Jackson County were even more taken in. The result was the $1,600,000 verdict. Appellant's motion for a mistrial (A.) should have been sustained.

F.
THE AWARD OF PUNITIVE DAMAGES VIOLATES APPELLANT'S DUE PROCESS RIGHTS

The right of access to the courts is a findamental right implicit in the concept of ordered liberty and guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution; *Ex Parte Hull,* 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed 1034 (1941); *Johnson v. Avery,* 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); and Sections 24 and 25 of Article 3 of the Mississippi Constitution of 1890. The threat of unrestricted punitive damages awards, such as $1,600,000, existing whenever an insurer litigates a contested claim, has a substantial "chilling effect" on the exercise of this fundamental right. This threat of unlimited punishment constitutes an oppressive influence on an insurer's decision whether to contest any claim. The dissent in *Standard Life v. Veal,* expressed its displeasure with this fundamental unfairness as follows:

> The Constitutional right of a litigant to defend a suit brought against him will be severely chilled,

> to say the least, if he is required to expose himself to the prospect that in the event he and his counsel should prove to be mistaken in their position and he loses, he will be assessed with punitive damages. This has never been the law in MIssissippi, and should never be.

354 So.2d at 252, 253.

Allowing a punitive damage award against Bankers Life because it chose to litigate the issue of coverage violates its due process rights and the rights of others similarly situated.

* * * * *

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 54,123

BANKERS LIFE AND CASUALTY COMPANY
Appellant

vs.

LLOYD M. CRENSHAW
Appellee

PETITION FOR REHEARING

Comes now Bankers Life and Casualty Company, pursuant to Rule 14 and petitions this Court for a rehearing on the appeal filed in this cause. Bankers Life submits that the Court has committed errors of law and fact in the majority opinion handed down on September 11, 1985, and in affirming the judgment in favor of the Appellee. The errors of law and fact and the distinct grounds for rehearing and reconsideration are as follows:

POINT 1

This decision was handed down on September 11, 1985. Less than one month prior, on August 14, 1985, the Court handed down *State Farm Fire & Casualty Co. v. Simpson*, Cause No. 54,606 (not yet published). The majority opinion in *Crenshaw* is manifestly in conflict with the law stated and applied in *Simpson* and *Blue Cross & Blue Shield of*

Miss. v. Campbell, 466 So.2d 833 (Miss. 1984). The majority opinion fails or refuses to apply, distinguish, overrule, *or even address* the applicable law established in *Simpson* and *Campbell.*

The majority opinion also completely ignores, and apparently overrules without notation, other recent Mississippi decisions holding that the proof must show gross, reckless or maliciously intentional conduct in order for punitive damages to be proper for breach of contract including a denial of an insurance claim. The majority opinion changes the law, deletes this requirement, and moves the burden to the insurer to prove that it had a justifiable or arguable basis for denying a claim. This decision creates a different and unequal standard for the application of punitive damages against insurers than other defendants and violates constitutional requirements of equal protection.

POINT 2

The Court's majority opinion fails to apply due process requirements of appellate review and assumes the role of an advocate in favor of the Appellee. The opinion goes completely outside the record to cross-examine and criticize the testimony and opinion of Dr. McParland. The opinion denies Bankers Life or any insurer the right to accept the opinion and advice of its own learned and qualified physician over the opinion of Plaintiff's physician. The opinion, *by lawyers,* denies Dr. McParland the right to disagree with the *opinions* of Dr. Westphal and Dr. Hockaday, *doctors,* even though *both doctors* testified that other physicians could reach other opinions.

POINT 3

The Court has failed or refused to consider Appellant's request for a review of the size of the verdict. The majority held "we are reviewing a matter which is by its very

nature committed to the sound discretion of the trial judge," and "where the trial judge acts upon these matters, we reverse only if the trial judge abuses or exceeds his discretion." (p. 50) The trial judge was indisputably under the mistaken belief that he had no authority to enter a remittitur of the punitive damage verdict. The failure to exercise any discretion is the same as an abuse of discretion. Bankers Life received no review at trial level, or on appeal, of its contention that the punitive damage verdict was excessive. The punitive damage verdict was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles. It is a fine or sanction with a purpose stated by the Court of punishment, but imposed without constitutionally mandated criminal safeguards and burden of proof.

POINT 4

The Court failed or refused to address or consider substantive legal reversible errors assigned as Errors D through F and argued and briefed by Bankers Life. The majority opinion does discuss the improper voir dire of Dr. McParland concerning medical malpractice suits but incorrectly states that Appellant "failed to favor us with any case in point." (p. 45) Authority directly on point is cited in Bankers Life's briefs. Further, the majority itself recognizes that "the mere fact that some person has been sued hardly effects either his reputation or credibility" (p. 46) verifying that the voir dire examination was not relevant and was solely for the purpose of creating bias and prejudice in the jury. It was utilized for this purpose by Crenshaw's attorneys in closing argument.

POINT 5

In arguing that Dr. McParland's opinion and testimony was not credible, the majority opinion incorrectly states, "As to the amputation site, Dr. Parland's [sic] first con-

tention, Dr. Westphal testified this site was chosen for function and that the fact the gangrenous condition had progressed far enough up the foot to indicate six inches below the knee was the safest place." (p. 42) In fact, Dr. Westphal testified, "in this situation, it was done to obtain better healing." (R. 711) The Court's clear error results from the analysis of the medical evidence far beyond the record and demonstrates the danger and error of the Court sitting as a medical review board utilizing authorities which with no medical witness was confronted.

POINT 6

The Court's majority opinion is plainly inconsistent on its face. It states that an insurance company faced with two separate and distinct medical theories should not have punitive damages assessed if it asserted in Court the theory favorable to its position even though the jury rejected the company's medical theory. Nevertheless, the majority, contrary to prior authority, refused to allow Bankers Life to rely on Dr. McParland rationalizing that he was not a disinterested witness. This holding and application is plainly contrary to decisions of the Mississippi Supreme Court in *Consolidated American Life Ins. Co. v. Toche,* 410 So.2d 1303 (Miss. 1982) and *Blue Cross v. Campbell;* decisions of the Fifth Circuit Court of Appeals in *Peel v. American Fidelity Assur. Co.,* 680 F.2d 374 (1982); and decisions of the United States District Court for the Northern District of Mississippi in *Horton v. Hartford Life Ins. Co.,* 570 F.Supp. 1120 (N.D. Miss. 1983) and *O'Connor v. Equitable Life Assur. Soc.,* 592 F.Supp. 595 (N.D. Miss. 1984).

POINT 7

The majority opinion erroneously asserts that Bankers Life asserted a different reason for denial of Crenshaw's claim at trial than given at the time of denial. This conclusion is completely refuted by the facts and specifically

the denial letters themselves which are quoted in Bankers Life's briefs.

WHEREFORE, PREMISES CONSIDERED, Bankers Life and Casualty Company, respectfully requests the Court to reconsider the majority opinion rendered in this cause, open the cause for additional hearing, briefs, and oral argument so as to allow Bankers Life to address the obvious errors of fact and law which have lead the majority to an unjust result, and to withdraw the opinion which has previously been rendered and substitute in its place the dissenting opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES G. COPELAND, do hereby certify that I have this day mailed a true copy of the above and foregoing Petition for Rehearing to ERNEST R. SCHROEDER, ESQ., BRYAN, NELSON, ALLEN, SCHROEDER AND BACKSTROM, 1103 Jackson Avenue, Post Office Drawer 1529, Pascagoula, Mississippi 29567, Attorneys for Appellee.

THIS, the 11th day of October, 1985.

/s/Charles G. Copeland
CHARLES G. COPELAND

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 54,123

BANKERS AND CASUALTY COMPANY

Appellant

vs.

LLOYD M. CRENSHAW

Appellee

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT 1

The majority opinion in *Crenshaw* is manifestly in conflict with the law stated and applied in *State Farm &*

Casualty Company v. Simpson, Cause No. 54,606 (not yet published) and *Blue Cross & Blue Shield of Mississippi v. Campbell,* 466 So.2d 833 (Miss. 1984). The following is quoted from *State Farm Casualty v. Simpson,* Judge Patterson writing for a unanimous Court:

> The term 'arguable reason' is now frequently before the Court. In *Blue Cross & Blue Shield of Miss. v. Campbell,* 466 So.2d 833 (Miss. 1984), concerning such statement, we held,
>
> We have come to term an insurance carrier which refused to pay a claim when there is no reasonably arguable basis to deny it as acting in 'bad faith,' and a lawsuit based upon such an arbitrary refusal as a 'bad faith' cause of action.
> 466 So.2d at 842.
>
> The term 'arguable reason' does not diminish the rule regarding the resolution of punitive damages because the assessment is no different in 'bad faith' cases than in other punitive damages cases. *Standard Life v. Veal, supra,* provides that punitive damages will not lie if the carrier has an arguable reason for denying the claim. *It does not necessarily follow, however, that punitive damages are mandated by the absence of an 'arguable reason.'* This is so because the denial of a claim could be the result of an honest mistake or oversight—ordinary or simple negligence—not reaching the heightened status of an 'independent tort' as set out in *Veal, supra,* and other cases.
>
> **THE ISSUE OF PUNITIVE DAMAGES**
>
> We are of the opinion the term 'legitimate or arguable reason,' although spawning much comment in our cases and in briefs and arguments of counsel, is nothing more than an expression indicating the act or acts of the alleged tortfeasor do not rise to the heightened level of an independent tort. Additionally,

> the very term expresses the holding of this Court establishing a distinction between ordinary torts, the product of forgetfulness, oversight, or the like; and heightened torts, which are the product of gross, callous or wanton conduct, or, if intentional, are accompanied by fraud or deceit. Lincoln Nat'l Life Ins. Co., *supra.*
>
> This is only to say that not all denied claims constitute *the gross, wanton or intentional conduct essential to the creation of an independent tort for which punitive damages will lie.* 'The mere fact that Lincoln rejected the claims under the provisions of its policy and defended the suit and lost does not justify imposition of punitive damages,' Lincoln National Life Ins. Co. v. Crews, 341 So.2d at 1322.

___So.2d at ___, (Emphasis Added)

In *Simpson* and *Lincoln National Life Insurance Co. v. Crews*, 341 So.2d 1321 (Miss. 1977), this Court makes it clear that a denial of a claim, even negligently, does not alone justify punitive damages. An arguable reason precludes punitive damages. "It does not necessarily follow, however, that punitive damages are mandated by the absence of an 'arguable reason'." Just as in areas outside insurance, a "heightened tort" is required.

Compare the irreconcilable language of the majority in *Crenshaw* handed down less than thirty days later:[1]

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[1] The language on page 46 of the opinion indicates that the majority opinion was circulated on May 23, 1985, prior to the August 14, 1985, rendition of *State Farm v. Simpson.* Nevertheless any rationalization that the *Crenshaw* decision preceds the *Simpson* decision would be illogical and would intentionally forever trap *Crenshaw* as an inconsistent aberration from the logic, justice, and reason followed in *Blue Cross v. Campbell* and *State Farm v. Simpson.* More pointedly, it would give the appearance of a conscious effort by the Court to intentionally deviate from the line of established authority in order to reach a particular intended result, only to quickly return to the established line of

> The Fifth Circuit Court of Appeals in two cases has interpreted our holding in *Veal* to mean that if the carrier offers no justifiable reason or arguable basis under Mississippi law for denying a valid claim, the issue of punitive damages must be submitted to the jury. *Black v. Fidelity & Guaranty Ins. Underwriters*, 582 F.2d 984, 990-991 (5th Cir. 1978); *Vogel v. American Warranty Home Services Corp.*, 695 F.2d 877 (5th Cir. 1983).
>
> We think this is a sound interpretation of *Veal.* Surely, if a justifiable reason or an arguable basis for denying a claim exists, the insurance company is under *a duty to assert* it; however, *without that foundation the requisite intent or gross negligence necessary for the recovery of punitive damages may reasonably be inferred.*

(pp. 32-33) (Emphasis Added)

In *Crenshaw* the majority has now held that "punitive damages are mandated by the absence of an arguable reason." The opinion further places the burden of an insurer to avoid punitive damages—"a duty to assert" an arguable reason.

This Court handed down the decision of *Blue Cross v. Campbell* in December, 1984 and rendered a decision on the Petition for Rehearing in April, 1985. Both opinions were written by Judge Hawkins for the Court. The following quotes are taken from these opinions:

> The uncontradicted testimony in this case is that the Blue Cross medical staff reviewed this claim and came to the conclusion, from the *records submitted,*

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authority by a case which was actually handed down prior in time. When *Crenshaw* was handed down *Simpson* had already been handed down and the Court knew the law explained and applied in *Simpson.*

this claim was excluded under the policy. Where is there any proof they acted arbitrarily or with caprice?

. . .

Strong argument is made about Dr. Yeldell's testimony at trial. It is not what Dr. Yeldell testified *at trial*, however, which is determinative of Blue Cross's bona fide questioning of Campbell's claim, but what Dr. Yeldell had written on the hospital medical records. Blue Cross had only the medical records before it when it denied the claim.

. . .

Any plaintiff asking for punitive damages, or any special or extraordinary damages based upon 'bad faith' of an insurance company has a heavy burden.

. . .

It can be argued with considerable persuasion that unless the trial judge grants a directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance carrier has shown reasonably arguable basis to deny the claim; and therefore, the carrier should never be subjected to the possibility of punitive damages based upon 'bad faith.'

There is compelling logic behind this argument and this would certainly appear to be true in the vast majority of cases. This criterion should ordinarily determine the answer to the question.

. . .

As we have stated, the plaintiff has a heavy burden to demonstrate to the trial court that there was no reasonably arguable basis for the insurance carrier to deny the claim. Unless he so demonstrates, the trial court as a matter of law is under a duty to remove any punitive damages claim based upon bad faith from

> consideration by the jury. The defendant insurance carrier is then entitled to a directed verdict on any 'bad faith' claim.

In *Simpson* Judge Patterson quoted *Blue Cross v. Campbell* and also stated:

> In our best judgment the preceding conclusions properly decide this case under its facts and our law. However, other words in the nature of obiter dictum seem appropriate. *A great majority of punitive damage cases should be ended by the trial court's refusal of a peremptory instruction for the plaintiff.* This is to say if the plaintiff is not entitled to a peremptory instruction, it *logically follows that a punitive damage instruction should be refused.* The refusal of the peremptory instruction indicates there are factual issues to be resolved by a jury and because of this it follows that the alleged tortfeasor has a logical reason for denying the claim, thereby prohibiting the granting of a punitive damage instruction.

___So.2d at ___. (Emphasis Added).

It is undisputed that the issue of whether Crenshaw's amputation resulted solely from disease or from a combination of disease and accident was properly submitted to the jury. It is undisputed that arteriosclerosis at a minimum played the major part in the causation of the amputation. It is undisputed that Dr. McParland was of the opinion that the amputation was due *solely* to disease. It is undisputed that Dr. McParland felt he could make this diagnosis based upon the records which he had. It is undisputed that Dr. Westphal testifying for Crenshaw testified that Crenshaw's amputation "may or may not have happened" solely from disease and that he did not think that anyone "could say with a hundred percent certainty what happened." (R.777)

The law as stated in *Simpson* and *Campbell* and the undisputed facts in *Crenshaw* simply cannot be reconciled with the majority opinion. Yet *Simpson* and *Campbell* are not overruled or discussed. The *Crenshaw* decision conflicts with the Court's established law and reasoning and the decision should be withdrawn and the dissenting opinion adopted by the majority. The prior decisions of this Court in bad faith cases are based upon considered opinions of numerous judges and should not be lightly abandoned nor ignored nor conveniently bent to reach an intended result. These prior decisions are *not* wrong, *Crenshaw* is wrong and should be corrected.

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POINT 3

At the hearing in the lower court on Motion for Remittitur, counsel for Bankers Life argued to the trial judge that the amount of punitive damages awarded against Bankers Life was excessive and a remittitur should be entered. Counsel argued to the lower court that it was the lower court's obligation to review the size of the verdict at that time (R.1233) and explained the factors to be considered in determining if a verdict for punitive damages is excessive. (R.1233-1240) When Appellant's counsel concluded his argument, Judge Lockhard stated:

> [T]he Mississippi Supreme Court recently . . . in a fairly recent case said that the trial court has no authority whatsoever to reduce or alter punitive damages. . . . The Supreme Court said I have no such authority. They are either there or they are not. The trial court cannot tamper with them. We can amend and, of course, add additurs and remittiturs to actual damages, but not to punitive. That's the position of our Supreme Court. (R.1243)

. . .

But anyhow, I don't have the authority to change the puntive damages. I think its a case that merited punitive damages, and you can properly argue the amounts to the Supreme Court. So, I overrule—
(R.1245) (Emphasis Added).

An Order overruling Bankers Life's Motion for Remittitur was subsequently entered. (R.1250) Thus, the lower court did not hear and expressly indicated that it would not consider Bankers Life's argument that the amount of punitive damages imposed against it was excessive, citing an alleged recent Mississippi Supreme Court decision.

In discussing the issue of excessiveness of punitive damages, this Court stated in its majority opinion as follows:

> Our general rule is that a damage award is so excessive that it should be altered or amended when it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience. (p. 49)
>
> . . .
>
> Where this test is met, the trial judge is authorized generally to enter a remittitur or an additur as may be appropriate under the facts and circumstances of the particular case. [Miss. Code Ann. §11-1-55 (Supp. 1984)]. This authority to enter a remittitur or an additur exists where the nature of the damage award at issue is punitive or exemplary. See *Standard Life Insurance Co. of Indiana v. Veal,* 354 So.2d 239, 249 (Miss. 1977) (rule impliedly recognized). We hold that motions challenging the quantum of punitive damages and seeking either a remittitur or an additur are subject to the same rules as motions challenging the amount of damage awards generally. *This means that on appeal we are reviewing a matter which is by its very nature committed to the sound discretion of the trial judge.* See *Jesco, Inc. v. Whitehead,* 451 So.2d

> 706, 714-716 (Miss. 1984) (Robertson, J., concurring). What in essence we are dealing with is a motion for a remittitur or in the alternative for a new trial on the issues of damages only. *Where the trial judge acts upon these matters, we reverse only if the trial judge abuses or exceeds his discretion. Dorris v. Carr,* 330 So.2d 872, 874 (Miss. 1976).
> (p. 49-50) (Emphasis Added)

The trial court stated that it had no authority to enter a remmittitur on the amount of punitive damages and the Supreme Court stated that it would not review the amount of punitive damages unless the trial court abused its discretion. The end result is that Bankers Life is not heard by either Court. In other words, Bankers Life never had its day in court on the issue of excessiveness of punitive damages. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. A deprivation of these rights violates the Fifth and Fourteenth Amendments of the U. S. Constitution. Such due process rights mandate that judicial proceedings give the parties opportunities to be heard on allegations and defenses and to present argument on legal issues.

Review of the size of the verdict "is by its very nature committed to the sound discretion of the trial judge." This was not done and a serious error has occurred. No glossing over of this error by a meaningless distinction between judicial conscience and the conscience of the members who make up the court will cure or heal the error which results in a payment of $1,6000,000. Nor will the protest that its not our job. "What he might have done had he been required to maturely reflect upon the matter we cannot know." (Hawkins Dissent, p. 6)

The Jackson County jury and the effect of the majority opinion are like the child in the cookie jar—once in they are going to eat a substantial amount without regard to

what is necessary to accomplish proper objectives: punishment, example, reward. What's needed has become lost in favor of what's available. There is no rational relationship between the size of the punitive damage verdict and any legitimate purpose. It is excessive, constitutes an excessive fine, and violates due process, equal protection and other constitutional standards.

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POINT 4

CONCLUSION

The majority opinion is unjust. It is an aberration from the line of law our Court has been negotiating and expanding since *Veal v. Standard Life.* If it becomes final, it will not stand the test of time no more than was *Reserve Life v. McGee* which also deviates from logic and justice. The deviation from course will eventually be condemned for what it is and corrected by later decisions or, if necessary, by statute. But what of Bankers Life and the $1,600,000? Will the judgment be undone six months or one year later? Will the money be returned? Bankers Life can absolutely absorb the judgment and pass it along to policyholders but will justice have been done? Will the public policy of Mississippi have been served? Lloyd Crenshaw and his attorneys will undoubtedly be secured but what of thousands of other Mississippi policyholders? What must they suffer so that Lloyd Crenshaw and his attorneys become so financial secure? The penalty applied is much too severe for any supposed offenses of Bankers Life. The impact upon the claims departments will be strong, but the impact will even be stronger upon the underwriters, the actuaries, the accountants, and the availability of insurance at reasonable cost.

Bankers Life can write the check, but the public is going to ultimately pay the bill. The fine is both unjust and

excessive. Its result cannot be rationally justified for any reasonable purpose.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT, BANKERS LIFE AND CASUALTY COMPANY

APPENDIX I

IN THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

No. 18,556

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

Plaintiff

vs.

EDWARD BRISTOW

Defendant

SPECIAL INTERROGATORIES

You, the jury should answer the rest of the questions in sequence as instructed here. Please answer the first two questions:

1. Do you believe based upon a preponderance of the evidence that Mr. Bristow was able to perform any [type of] occupation [or profession] for which he was reasonably suited by education, training or experience on March 9, 1982?

YES ------

NO --✓--

2. Do you believe based upon a preponderance of the evidence that Mr. Bristow is able to perform any [type of]

occupation [or profession]* for which he is reasonably suited by education, training or experience now?

YES ——————

NO ——✓——

If you answer both questions 1 and 2 above yes, then you should not consider any further questions and you should return these questions as your verdict. If you answer question No. 1 above NO, then you should answer the following question.

3. Do you believe based upon a preponderance of the evidence that Life & Casualty Insurance Company of Tennessee had an arguable or legitimate reason for terminating Mr. Bristow's benefits on March 9, 1982?

YES ——————

NO ——✓——

If you answer YES to the preceding question, then you should not answer any more questions and you should return these answers as the verdict of the jury. If your answer is NO, then you should answer the following question.

4. Do you believe based upon a preponderance of the evidence that Life & Casualty Insurance Company of Tennesse's termination of benefits constituted a willful and intentional wrong *or* constituted such gross or reckless negligence as to be equivalent to such a wrong?

YES ——✓——

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* The bracketed words appeared in the draft Special Interrogatories to the jury submitted to the court by appellant. The court deleted the bracketed words before the Special Interrogatories were submitted to the jury for its responses and verdict.

NO------

If you answer NO to the preceding question, then you should not answer any more questions and you should return these answers as the verdict of the jury. If you answer YES, then you *may* in your discretion award damages as *otherwise* instructed by the court and the form of your verdict shall be in the following form:

> We, the jury, find for Edward Bristown in the amount of $ ____ actual damages.
>
> or
>
> We, the jury, find for Edward Bristow in the amount of $50,000.00 actual damages and $6,000,000.00 punitive damages.